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In the
Supreme Court of the United States

OCTOBER TERM, 1994

MARILYN RITTER, Bankruptcy Trustee,
Substitute for TOMMY H. CONDREY,
Petitioner

versus

RICHARD K. HOWARD, JR., LEO A. MILLER, JR.,
HOWARD GIN, INC., and LOUISIANA FIBER CORP.,
Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 3, 1994

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QUESTIONS PRESENTED

1. Can "relationship" for purposes of a "pattern of racketeering activity" (18 U.S.C. § 1961(5)— the RICO statute) be shown by wrongful acts which affect different victims?

2. Can "continuity" for purposes of a "pattern of racketeering activity" (18 U.S.C. § 1961(5)— the RICO statute) be shown by predicate acts that involve two different schemes and four different victims over a period of two and a half years?

LIST OF PARTIES

1. Marilyn Ritter, bankruptcy trustee for the Estate of Tommy H. Condrey

2. Tommy H. Condrey

3. Richard K. Howard, Jr.

4. Howard Gin, Inc.

5. Louisiana Fiber Corp.

6. Leo A. Miller, Jr.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marilyn Ritter, bankruptcy trustee as substitute for Tommy H. Condrey, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals is included in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on

July 5, 1994. The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition for Writ of Certiorari involves the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. For purposes of this petition, the most relevant provision is 18 U.S.C. §1961(5):[1]

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

STATEMENT OF THE CASE

On May 1, 1989, Tommy H. Condrey filed suit against Richard K. Howard, Jr., Leo A. Miller, Jr., Howard Gin, Inc. (HG), and Louisiana Fiber Corp. (Fiber), alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. %1961 *et seq.* (RICO). The heart of the claim was that Howard, Miller (his attorney), Fiber, and HG used their association with a cottonseed enterprise to steal property and cottonseed. In accomplishing their schemes, the defendants committed numerous predicate acts (mail fraud and wire fraud) over a period of more than two years.

During the pre-trial phase, one district court judge

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[1] The statute is included in the Appendix.

denied six 12(b)(6) motions and three motions for summary judgment on the issues of enterprise, predicate acts, corporate liability, and standing. The first trial took place from July 15-22, 1991. A jury found that Miller and Fiber violated the RICO statutes, causing $300,000 in damages to Condrey. On September 19, 1991, however, the judge ordered a new trial on the ground that the jury verdict was inconsistent, the jury having found Fiber liable for RICO violations but having failed to find liability for Howard, its president and CEO.

The second trial took place June 22-30, 1992 with a different judge presiding. On the third day of trial, defendant Miller settled with Condrey for $150,000. After deliberating six hours on the seventh day of trial, the jury found the existence of the alleged enterprise, a pattern of racketeering activity by all defendants, violations of the RICO statutes, and damages in the amount of $700,000. A final judgment was signed on August 17, 1992.

On December 2, 1992, the new judge granted a Motion for Judgment as a Matter of Law (FRCP 50), overruling everything that the jury had decided. While acknowledging that the jury had found fraud in the theft of the cottonseed-handling equipment, fraud in the conversion of a 20-year warehouse lease, and fraud in the shortweighing of cottonseed, he reasoned that it was not RICO fraud because there were not enough predicate acts. He further found that there was no cognizable RICO enterprise of any kind.In the alternative, he ordered a new trial on the grounds that one of the jury charges was incorrect, that there were no predicate acts involved in the shortweighing, and that evidence of shortweighing had contaminated the

trial. Condrey timely filed a notice of appeal on December 10, 1992.

The Fifth Circuit Court of Appeals affirmed the judgment of the district court. However, it declined to follow the reasoning of the district court. The Fifth Circuit did not address the issue of enterprise but acknowledged that the conversion of property and the shortweighing of cottonseed in 1986, 1987, and 1988 involved wire and mail fraud. Nevertheless, the Fifth Circuit ruled that the predicate acts did not form a pattern of racketeering activity.

STATEMENT OF FACTS

Cottonseed is a by-product of cotton ginning. Traditionally, the seed has been sold to make cottonseed oil. In the early 1980s, dairymen began using cottonseed as feed for their animals and the price of that commodity rose to around $100 a ton.

To take advantage of this lucrative new market, Tommy Condrey and Richard Howard created a cottonseed business in Lake Providence, Louisiana. Howard's attorney, Leo Miller, incorporated the business under the name of Dixie River Cotton Products, Inc.(DRCP), in November 1985.[2] Condrey travelled to develop the market, buy seed from cotton farmers, and sell seed to oil mills, dairymen, and grain dealers. Howard remained in Lake

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[2] Defendant Miller was also the attorney for Howard Gin, Inc. (a corporation owned by Howard's father and other family members), Louisiana Fiber Corp. (a corporation owned by Howard), and the Port Commission of Lake Providence.

Providence to receive, warehouse, and ship the seed. Howard was also the vice president and general manager of Howard Gin, Inc. and could provide a steady supply of cottonseed.

The Port Lease

In the Spring of 1986, Howard and Condrey learned that the Port Commission was seeking bids on a 20-year lease for a large warehouse located at the Mississippi River port of Lake Providence. Since business was good, Condrey and Howard agreed tht DRCP would make a bid on the facility. Howard consulted with Miller, who was also the attorney for the Port Commission. While Condrey was travelling, Howard kept him informed by telephone of the progress of the bid.[3] In June 1986, Howard asked Condrey to come back to Lake Providence to attend the meeting of the Port Commission where the bids would be considered. The bid was accepted at the July meeting. The minutes of the two meetings were published in the official journal of East Carroll Parish *as required by law.* The newspaper was sent to all subscribers through the U.S. Mail.[4] At least two letters were mailed in connection with the lease.

Contrary to Howard's representations, the bid that he and Miller prepared was made on behalf of **Dixie River Cotton Seed, Inc.,** a non-existent corporation. When the lease was finally drawn up by Miller, it listed **Louisiana**

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[3] The Fifth Circuit did not count as predicate acts these interstate telephone conversations in which Condrey was lulled into cooperation with Howard.

[4] Unlike the Eighth Circuit in *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986 (8th Cir. 1989), the Fifth Circuit did not count these required mailings as predicate acts.

Fiber Corp. d/b/a Dixie River Cottonseed Products as the holder of the lease. Fiber was Howard's closely held corporation. It had never done business as Dixie River Cotton Seed or Dixie River Cottonseed Products, Inc. Two Port Commission officials testified that Miller never made them aware of the discrepancy between the names on the bid and the lease.[5]

The Walden Loaders

While Howard and Condrey were loading seed in Texas, they agreed that DRCP would buy three used Walden front end loaders from a Texas businessman for $22,000. Mortgage papers were sent by U.S. Mail from the seller in Harlingen, Texas to Miller in Lake Providence and back to Harlingen. At the instructions of Howard and Miller, the papers placed title of the Waldens in H & W Warehouse (another Howard business) instead of in DRCP. Subsequent Walden payments to the Texas seller were made with seed money and sent through the U.S. Mail. (T.110-112; Plaintiff's Exhibit 93).[6]

The Problems with Agway, Inc.

Agway, Inc., a New York corporation, did $600,000 to $800,000 in business with DRCP in 1986. Unfortunately, on five barges sent from Lake Providence to Agway's

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[5] Condrey and Howard agreed that DRCP would buy a second warehouse, known as the Hycoloader Building. Although a similar title-shifting scheme gave Howard ownership of the building, no predicate acts were involved.

[6] The Fifth Circuit did not count these mailings as predicate acts.

facility in Pennsylvania, a total of 99.1 tons was missing. Condrey later discovered "cheat sheets" that Howard had used in fabricating bogus tickets for Agway. The tickets were sent by federal express or fax to Agway's corporate offices in New York. Agway wired the money to DRCP's bank account in Louisiana on November 3, 1986, November 10, 1986, November 18, 1986, and November 24, 1986.

In December of 1986, DRCP ran out of seed. Condrey showed at trial that the shortfall was caused by the failure of Howard Gin to deliver to DRCP all the seed for which it was paid. Because of the shortfall, DRCP could not deliver seed for which Agway had given a $50,000 advance. Condrey hoped to pay Agway back with future grain sales, but Howard and Miller decided to litigate. Condrey refused to defend himself at the trial. Personal judgments were entered against both Condrey and Howard at trial; the judgment against Condrey was $72,144.89.

The Partnership Phase

Although Condrey was despondent over the collapse of the corporation, Howard assured him that he was a partner with Howard, that he still had a 50% ownership interest in the assets and the business, and that he would get 50% of all profits generated from the business. Condrey was suspicious of Howard, but he had little choice but to cooperate with Howard in order to salvage what he could from the business that he had worked so hard to develop. Howard, of course, depended on Condrey to buy and sell the seed.

The Problems with Farmer's Cottonseed, Inc.

In 1987, Tommy Condrey persuaded Farmer's Grain Terminal, a large grain dealer with offices in Arkansas and Mississippi, to get involved in the cottonseed business and to store seed in the DRCP warehouses. Farmer's Grain formed Farmer's Cottonseed. Farmer's Cottonseed paid Condrey $2,000 a month to continue to do what he had done for DRCP— buy seed from ginners and market seed to buyers like Agway. Farmer's agreed to pay $14 per ton for seed stored in the DRCP facilities. Howard agreed to split all warehousing profits with Condrey, 50-50. The warehousing was done by employees of Howard Gin under the supervision of Richard Howard. Howard handled the billing for the warehousing services as well as for the sale of seed to Farmer's by Howard Gin.

Payment for the seed was based on weight tickets. Some of the weight tickets were hand delivered to Farmer's offices in Eudora, Arkansas. According to Howard's deposition testimony, other weight tickets were sent by U. S. Mail. A total of 21,000 tons went through the cottonseed warehouses in 1987 and 1988. Condrey expected to see profits of $120,000 to $150,000. Yet, Howard claimed that there were no profits made on the $294,000 paid by Farmer's. Even worse, Farmer's realized in July 1988 that it had paid for roughly 1000 tons more than it received from Richard Howard. This seed was worth $179,000.

After the seed shortage, Farmer's fired Condrey because of his association with Howard and refused to pay Howard Gin about $25,000 in retainage. Farmer's asked for its money back or for transfer of the port lease. Rather

than reimburse Farmer's out of Howard Gin's illicit revenue, Howard gave the port lease to Farmer's. Included in the deal were two of the Walden loaders that DRCP had purchased, as well as other equipment bought with cottonseed money.[7]

Since Howard's attorney was also the attorney for the Port Commission, the deal was accomplished without the required public notice or hearing. Condrey, of course, could not stop the transfer because neither his name nor the name of DRCP was on any of the titles. All title transfers, compromise agreements, and title opinions were sent through the U.S. Mail from Miller's office in Lake Providence to Farmer's office in Greenville, Mississippi in September and October of 1988.

Although Farmer's never found the missing seed, Condrey established at the trial that Richard Howard's submitted fabricated tickets to Farmer's just like he submitted fabricated tickets to Agway.

Damages

Condrey did not have standing to seek damages for the harm caused to DRCP, but only for the harm done to him personally. His damages included the amount that he had to pay to Agway, the lost salary from Farmer's, and his past and future lost earnings from the cottonseed business after it entered the partnership phase. The jury awarded $700,000 as Condrey's damages for these injuries.

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[7] Howard kept the Hycoloader Building where he continues to store cottonseed to this day.

REASONS FOR GRANTING THE PETITION

The RICO statute, in its civil application, was meant to deter systematic white collar crime that increases the cost of doing business, destroys jobs, kills the hopes of legitimate entrepreneurs, and undermines the free enterprise system. Language in the statute (especially the enterprise and pattern requirements) insures that the remedies will apply only to persons who engage in repeated acts of wrong-doing over a long period of time.[8] A too-rigid application of statutory language, however, sabotages the goals of the statute.

This case presents a significant opportunity to revisit the "pattern of racketeering activity" requirement for RICO liability, to reduce some of the conflict in the circuits, and to remind the courts that RICO is to be liberally interpreted so as to effect its remedial purposes. It has been five years since *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2693, 106 L.Ed.2d 195 (1989) was decided. While that opinion suggested that pattern could be established through the elements of "relationship" and "continuity," the concurring opinion of Justices Scalia, O'Connor, Kennedy, and Chief Justice Rehnquist expressed the fear that *H.J.* would not provide the guidance needed and that the Courts of Appeal would continue to espouse a "kaleidoscope of positions." *H.J.*, 109 S.Ct. at 2908.

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[8] The "pattern" requirement is more than incidental to the operation of the RICO statute. In providing a remedy of treble damages for injury "by reason of a violation of RICO's substantive provisions, 18 U.S.C. § 1964(c)," Congress contemplated that only a party engaging in widespread fraud would be subject to such serious consequences. *Menasco v. Wasserman*, 886 F.2d 681, 683 (4th Cir. 1989).

Although Justice Scalia stated that a precise explanation of the pattern requirement was "beyond [him]," it should be possible at this time to exclude those applications which erect unjustified hurdles in the path of defrauded plaintiffs, ignore the liberal interpretation policy that Congress and the Supreme Court have counselled in RICO cases,[9] and create uncertainty in the minds of attorneys, clients, courts, and the public.[10] In order to have any meaningful deterrent value, the RICO statute must be applied fairly and evenly across the circuits.

I.

The Court of Appeals incorrectly held that the relationship element of the RICO pattern requirement could not be satisfied by predicate acts which defrauded one victim of property and which cheated two other victims through shortweighing of cottonseed.

Tommy Condrey proved to the satisfaction of the jury that Howard, Howard Gin, and Louisiana Fiber Corp. overbilled Agway for 100 tons of cottonseed in 1986 and Farmer's Cottonseed for 1,000 tons in 1987 and 1988. Condrey proved that the Agway scheme involved wire fraud and that the Farmer's scheme involved mail fraud. Condrey also established that Howard and Miller improperly

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[9] *Sedima, S.P.R.I. v. Imrex Co.*, 473 U.S. 479, 498, 105 S.Ct. 3275, 3287, 87 L.Ed.2d 346 (1985). *Sedima*, for example, instructed the courts that civil RICO does not require a prior criminal conviction or a special "racketeering injury." Similarly, *H.J.* explained that the statute does not require "multiple criminal schemes."

[10] Several of the jurors in the two Condrey trials have asked what happened to their verdict and wonder why they gave up 10 days of their lives to decide facts that were ignored by the courts.

put title to a 20-year warehouse lease in the name of Louisiana Fiber Corp., a closely held company of Richard Howard, instead of in the name of Dixie River Cotton Products, Inc., a company owned by both Condrey and Howard. Similarly, they transferred title of cottonseed-handling equipment worth $22,000 (the Walden loaders) to another Howard Company. When Howard was caught in a shortweighing scheme, they gave this property to the victim of the scheme, effectively destroying the cottonseed enterprise that Condrey had worked so hard to create.

Condrey alleged and the jury found that these predicate acts were related because they were committed

1. by the same participants (Richard Howard and the Howard corporations, aided and abetted by attorney Miller).

2. against similar victims (cottonseed companies like DRCP, Agway, and Farmer's).

3. for similar purposes (funnelling money and assests to the Howard family).

4. with similar results (cheating honest enterprises and causing damage to Condrey).

5. using similar methods (making fraudulent representations by mail and by wire in connection with the cottonseed business; using a lawyer to manipulate the bidding process, record fraudulent titles, and cover-up theft).

The acts are "otherwise related" inasmuch as the stolen

property (the Walden loaders and the port lease) was transferred to Farmer's Cottonseed to reimburse Farmer's for missing seed. If Howard had not committed the predicate acts which put him in control of the property, he could not have transferred the property without the consent of Condrey. He would have been obliged to pay back Farmer's for the cottonseed overcharge (approximately $179,000) with money that Howard Gin was overpaid. Secondly, the predicate acts are related through the person of Condrey. The direct victims of each scheme were Dixie River Cotton Products, Agway, and Farmer's Cottonseed, Inc. However, when Agway was cheated, Condrey was cast personally in judgment for $72,000. When Farmer's was cheated, Condrey lost a $24,000-a-year job and annual profits of approximately $60,000 from the warehousing venture. When the DRCP assets were transferrd to Farmer's, Condrey could no longer participate in the cottonseed enterprise.

Despite this evidence, the Fifth Circuit held that the relationship prong was not satisfied by the racketeering acts of Richard Howard.

> The predicate acts allegedly proved in this case are of two types: (1) those that divested Dixie River Cotton Products of property that should have belonged to it and (2) those that cheated two customers of DRCP and its successors. There is no relationship between these two types of dishonest dealing which had different victims, purposes, results, and methods of commission .

Appendix A13-A14. In effect, the Fifth Circuit has written

the word "similar" out of the jurisprudence and has required an overly rigid adherence to every single factor of the *H.J.* "relationship" test.

The Fifth Circuit's interpretation of pattern is contrary to the teaching of the Supreme Court and in conflict with other circuits. In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), the Supreme Court explained that "[t]he element of relationship is easier to define for we may take guidance from ... 18 U.S.C. § 3575 *et seq.*"

> [C]riminal conduct forms a pattern of racketeering activity if it embraces criminal acts that have the *same or similar* purposes, results, participants, victims, *or* methods of commission, *or* otherwise are interrelated by distinguishing characteristics and are not isolated events.

H.J., 109 S.Ct. at 2901.(Emphasis supplied) The *H.J.* test gives guidance for finding an organizing principle which shows relationship among repeated wrongful acts. The *double* use of the disjunctive ("or") means that not all the factors will apply to each situation. The word "similar" means that the plaintiff does not have to be the victim of every predicate act alleged and that certain details of the scheme can vary. Further on, in its discussion of "continuity," the Supreme Court even gave an example of predicate acts directed against multiple similarly-situated victims:

> Suppose a "hoodlum" were to sell insurance to a neighborhood's storekeepers to cover them against breakage of their windows, telling his vic-

> tims he would be reappearing each month to collect the "premium" that would continue their "coverage".

H.J., 109 S.Ct. at 2902.

Other Circuits have applied the "same or similar" test in a much more flexible manner than the Fifth Circuit did in this case. *Banks v. Wolk*, 918 F.2d 418 (3rd Cir. 1990), for example is very instructive. Banks sued Wolk (his former partner), Larry Cohen, Brad Cohen, and two Cohen corporations (FFIC and FFFG) for real estate fraud involving the "AP Building." The Third Circuit declined to allow a RICO suit against the unfaithful partner because the "AP Building Scheme was an attempt to defraud a single investor of his interest in a single piece of real estate over a relatively short period of time [8 months]." *Id.* at 422. This scheme did "not amount to or threaten long-term criminal activity." *Id.* at 423. As to the Cohens, however, the court found a pattern of racketeering activity. They allegedly participated in a scheme to lower the value of another property and misappropriated funds that had been entrusted to them by several different investors. The *Banks* Court provided the following common sense explanation for finding that the Cohen activity satisfies the "relationship" test.

> [T]he fact that Banks was not a victim of the additional frauds should not carry much weight. The reference to "similar victims" in *H.J., Inc.* cannot be read to require that a plaintiff be injured by more than one predicate act. *See, e.g. Town of Kearny v. Hudson Meadows Urban Renewal*

> *Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987) ("Reading into the statute a requirement that a civil plaintiff prove injury from the entire pattern rather from any predicate act would ... be inconsistent with the core congressional purposes behind its enactment"). The alleged victims in this case were "similar" in the sense that they were engaged in business dealings with the Cohens through FFIC and FFFG....
>
> In cases such as this, which allege multiple fraudulent schemes conducted through an otherwise legitimate entity, the relatedness requirement should not insulate defendants who merely vary the methods by which they defraud their victims.

Banks 918 F.2d 424, 425.[11]

Similarly, the plaintiff in *Ticor Title Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991) complained of injuries sustained from the forging of one federal tax lien release but established the pattern requirement through evidence of two other forgeries by the same defendants within the space of 13 months. The Ninth Circuit held that the three forgeries "were related under the Supreme Court test [i.e. *H.J.*.] because they had both similar purposes and identical methods of commission." *Id.* at 450. Significantly, the Ninth Circuit did not require the plaintiffs to satisfy every

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[11] *See also Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989): "Shearin has pleaded a pattern of racketeering... the complaint describes three perpetrators involved in at least one open-ended scheme to defraud presumably numerous investors and, problematically, honest employees as well." *Id.* at 1166.

factor in the *H.J.* test.

The Eleventh Circuit cited *Banks* with approval in *Jones v. Childers,* 18 F.3d 899 (11th Cir. 1994) while upholding RICO liability against a defendant who defrauded the plaintiffs in two investment schemes and who defrauded other similarly situated victims (professional football players with no financial sophistication) in similar schemes.

> While ... the two violations perpetrated against the Joneses do not, in and of themselves, provide a sufficient basis for finding "continuity," the totality of the evidence as to Childers' business practices with respect to the other athlete investors sufficiently establishes a pattern of criminal activity.

Id. at 913. The Eleventh Circuit analogized the civil RICO practice of considering predicate acts related to other victims to the criminal RICO practice of allowing the existence of different schemes and different crimes to support a finding of pattern.[12]

> In criminal cases, this and other circuits have permitted prosecutors seeking to prove RICO violations to introduce testimony relating to uncharged criminal acts against a defendant. *See, e.g. U.S. v. Gonzalez,* 921 F.2d 1530, 1546 (11th Cir. 1991)... *U.S. v. Kaplan,* 886 F.2d 536, 542-544

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[12] The interpretation of the RICO statutes is the same in civil and in criminal cases. *Haroco, Inc. v. American National Bank & Trust Co.,* 747 F.2d 384 (7th Cir.), *aff'd* 473 U.S. 606, 105 S.Ct. 3291, 876 L.Ed.2d 437 (1985).

> (2d Cir. 1989)... *U.S. v. Finestone,* 816 F.2d 583, 587 (11th Cir.), *cert. denied* 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987).

Id..[13]

Although *Vild v. Visconti,* 956 F.2d 560 (6th Cir.), *cert. denied* 113 S.Ct. 99 (1992) purports to disagree with *Banks v. Wolk,* 918 F.2d 418 (3d Cir. 1990), the Sixth Circuit still accepts the idea that in establishing pattern, a plaintiff may assert predicate acts by which he was not personally harmed.

> We do not hold that a civil RICO plaintiff must necessarily be directly harmed by all the alleged predicate acts because harm from one enumerated violation may, in certain situations, be sufficiently connected. Our conclusion merely reflects that this plaintiff, under the circumstances in this case, may not use unrelated predicate acts that allegedly may have harmed ultimate purchasers or other third parties not similarly situated to the plaintiff. When Vild complains that he was not allowed to reap the benefits of the injury-causing enterprise of which he would have been a part, he has failed the relationship test.

Id. at 567.

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[13] *See also U.S. v. Busacca,* 936 F.2d 232 (6th Cir.), *cert. denied* 112 S.Ct. 595 (1991); *U.S. v. Eufrasio,* 935 F.2d 553 (3d Cir.), *cert. denied* 112 S.Ct. 340 (1991).

The Seventh Circuit found the relationship test satisfied in the case of an oil distributor who stole gasoline from four different oil suppliers over a period of four months. *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989). Rather than destroy the relationship test, the fact that the defendants engaged in a variety of unlawful methods to achieve and conceal their schemes (mail and wire fraud, bankruptcy fraud, and arson) served as proof to the court that the defendants were racketeers and that the racketeering activity had continuity. *Id.* at 1279. The *Ashland Oil* Court frankly admitted that there is often a tension between "relationship" and "continuity" and that a flexible approach is needed to prevent negation of one concept by the other:

> [T]he terms "continuity" and "relationship" are somewhat at odds with one another. Relationship implies that the predicate acts are committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points of time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong.

Id. at 1277, *citing Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

Like the Seventh Circuit in *Ashland Oil*, the Eighth Circuit found a pattern of racketeering activity in a case involving multiple victims. *Atlas Pile Driving Co. v. DiCon*

Financial Co., 886 F.2d 986 (8th Cir. 1989).[14] In this case, the defendants loaned money to undercapitalized insider borrowers, persuaded subcontractors to supply materials and labor, and foreclosed on the borrowers. Because the liens of the subcontractors were subordinated to the mortgages of the defendants' lending institution, the defendants obtained the labor and the materials without paying for them. Thus, the victims were similarly situated and the methods were the same. These schemes were carried out in two separate projects separated in time by a period of several months. Each subcontractor was injured by only two predicate acts (mailing of the foreclosure notice and mailing of newspapers in which the notice was published).[15] Together, however, the mailings affecting all the victims satisfied the relationship and the continuity tests for each plaintiff.

The fact that all injured victims were joined as plaintiffs in the *Ashland* and *Atlas* cases does not detract from the fact that each plaintiff was allowed to use criminal activity affecting other persons to prove a pattern of racketeering activity for purposes of its RICO claim.

II. The Court of Appeals Incorrectly Held that There Was No Continuity in a Case Involving Four Victims, Repeated Acts of Title Shifting and Shortweighing, and a Time Span of Two and a Half Years

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[14] *See also Fleischhaur v. Feltner*, 879 F.2d 1290 (6th Cir. 1989).

[15] Unlike the *Atlas Pile Driving Court*, the Fifth Circuit refused to recognize that the mailing of official notices in newspapers could be a predicate act.

In addition to finding no relationship among the predicate acts, the Fifth Circuit found no threat of continuing criminal activity. Appendix A-14. Despite evidence that the port lease fraud occurred throughout the spring of 1986, that the Walden Loader fraud occurred in August of 1986, that the Agway cottonseed fraud occurred in November and December of 1986, that the Farmer's Cottonseed fraud occurred from July of 1987 to August of 1988, and that the fraudulent transfer of cottonseed property took place from August to October of 1988, the Fifth Circuit ruled that "RICO liability is not suitable against the sporadic, scattered misdeeds of Richard Howard." (Appendix A-15).

According to *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), plaintiffs alleging a pattern of racketeering activity can establish the continuity element in several ways. For the "closed period" type of continuity, they must show "a series of predicate acts extending over a substantial period of time." *H.J.*, 492 U.S. at 242, 109 S.Ct. at 2902. "Predicate acts ... extending over a few weeks or months do not satisfy the requirement." *Id.* Under the "threat" approach, plaintiffs must show either that the predicate acts were a regular way of doing business or that the predicate acts may continue in the future. While multiple schemes are not required by the statute, they might be indicative of continuity.

Ignoring testimony that cotton ginning is a seasonal business, running from September to approximately December of each year, and that the bulk of seed shipments will occur in the same months, the Fifth Circuit described

the predicate acts of Howard as sporadic. It refused to consider the time frame significant even though it encompassed two and a half years. Although the evidence was that Richard Howard cheated everyone that he and his companies did business with, the Fifth Circuit denied that racketeering activity was Howard's regular way of doing business. Nor could the Fifth Circuit accept the idea that Richard Howard projects a threat of racketeering activity into the future despite the fact that he kept the Hycoloader Building after the settlement with Farmer's and continues to store cottonseed for other gins in that building. (T.250, 605-06)

In *Swistick v. Jones,* 884 F.2d 755 (3d Cir. 1989), the Third Circuit ruled that "numerous predicate acts of mail and wire fraud over a period of approximately fourteen months" could satisfy the continuity prong of the pattern requirement. *Id.* at 759. Included in that 14 month period were three separate schemes: fraudulent inducement to purchase mineral interests, fraudulent settlement negotiations, and fraudulent double billing for mining equipment. The Court further suggested that pattern is a question for the jury.

Other courts have found continuity in closed-ended periods ranging from approximately one to ten years: *Fleet Credit Corp v. Sion,* 893 F.2d 441 (1st Cir. 1990) (4 1/2 years); *Newmeyer v. Philatelic Leasing Ltd.,* 888 F.2d 385 (6th Cir. 1990), *cert. denied* 110 S.Ct. 2169 (1990) (5 years); *Atlas Pile Driving Co. v. DiCon Financial Co.,* 886 F.2d 986 (8th Cir. 1989) (3 years); *United Energy Owners Committee, Inc. v. U.S. Energy Management Systems, Inc.,* 837 F.2d 356 (9th Cir. 1988) (more than a year); *Proctor &*

Gamble v. Big Apple Industrial Buildings, Inc., 879 F.2d 10 (2d Cir. 1989) (nearly two years); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989) (4 months).

In *Ticor Title Co. v. Florida*, 937 F.2d 447 (9th Cir. 1990), the Ninth Circuit held that three forgeries in 13 months demonstrated that racketeering activity was a regular way of doing business. Similarly, *U.S. v. Indelicato*, 865 F.2d 1370 (2d Cir.), *cert. denied* 491 U.S. 907, 109 S.Ct. 3192, 105 L.Ed.2d 700 (1989) held that three almost simultaneous assassinations carry a threat of continuity.

The Fifth Circuit has characterized Howard's criminal activity as "opportunistic." To the extent that Howard would turn to dishonest practices to further the interests of Howard Gin, Louisiana Fiber, and other Howard companies whenever the opportunity presents itself, Condrey has shown continuity rather than sporadic activity. To the extent that the schemes involved repeated acts of ticket and title forgery over a period of two and a half years, Condrey has shown significant duration of time. Considering the acts proved at trial, the seasonal operation of the seed business, the efforts made by Howard to conceal his crimes, the findings of the jury, and the failure of the Court of Appeals to consider many predicate acts, it is an error of law to hold that Condrey did not prove the continuity element of the pattern requirement.

While the Supreme Court cannot set a time limit for continuity, it can suggest factors to be considered in deciding duration or threat of continuing activity. The Condrey case suggests that such factors could include (1) whether the acts focus on a single clearly defined, discrete,

and finite goal, (2) whether the acts involve multiple schemes, (3) whether the acts have affected more than one victim, (4) whether the acts caused separate injuries to separate victims, (5) whether the acts continued for more than a year, (6) whether the acts were repeated when opportunities presented themselves, and (7) whether the acts involved a variety of wrongful practices. The Court can also apply the liberal interpretation rule to the continuity element and discourage the lower courts from substituting arbitrary decisions for the fact-finding work of the jury.

CONCLUSION

The human intelligence has an infinite capacity to create good institutions and an equal capacity to infiltrate, steal from, and destroy these institutions. The purpose of the RICO statute is to deter those people who engage in such criminal activity over a long period of time. A rigid interpretation of the pattern requirment in the RICO statute provides giant loopholes through which the most creative wrong-doers can escape.

For these reasons and because the Fifth Circuit is in conflict with the other circuits, this petition for a writ of certiorari should be granted, the determination of the Fifth Circuit Court of Appeals should be reversed, and the verdict of the jury should be reinstated.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5261

FILED
JUL 05 1994

MARILYN RITTER, Bankruptcy Trustee,
Substitute for TOMMY H. CONDREY,
Plaintiff-Appellant,

versus

RICHARD K. HOWARD, JR., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(CV-89-0953)

Before JONES and DeMOSS, Circuit Judges, and SCHWARTZ,* District Judge.

EDITH H. JONES, Circuit Judge:**

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* District Judge of the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Tommy Condrey appeals after his second jury trial in this civil RICO case. Both trials resulted in large verdicts favorable to him, and both times the trial court refused to enter judgment on the verdict, granting a motion for new trial the first time around and a judgment as a matter of law following the second trial.

Condrey's case was constructed despite many and complex conceptual and factual difficulties. We will not dwell on the niceties of such issues, nor will we attempt to rehash the involved relationships among Condrey, his firms, and the defendants. Even if Condrey could succeed on all the other issues raised on appeal, we are persuaded that the trial court properly held that he did not prove that the alleged RICO enterprise — consisting of himself, Richard Howard, Louisiana Fiber Corp., Howard Gin, Inc., and Dixie River Cotton Products — engaged in a "pattern of racketeering activity."

DISCUSSION

This court reviews *de novo* a district court's judgment as a matter of law pursuant to Fed. R. Civ. P. 50. *See Omnitech Int'l, Inc. v. The Clorox Co.*, 11 F.3d 1316, 1322-23 (5th Cir. 1994). A grant of judgment as a matter of law is appropriate when, after considering all of the evidence presented at trial in the light most favorable to the non-moving party, the evidence points so strongly and overwhelmingly in the moving party's favor that reasonable jurors could not have reached a contrary conclusion. *See id.*

A.

Racketeer Influenced and Corrupt Organisations (RICO)

As a general matter, all Racketeer Influenced and Corrupt Organizations ("RICO") claims require proof of (1) a person engaging in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *See* 18 U.S.C. § 1962; *see also In re Burzynski*, 989 F.2d 733, 741-42 (5th Cir. 1993); *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991).

Our analysis regarding whether Condrey established a sufficient pattern of racketeering activity — a required element of a successful civil RICO action — is dictated by *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989). In *H.J. Inc.*, the Court concluded that although the RICO statute provides for as few as two predicate acts to support a finding of a pattern of racketeering activity, *see* 18 U.S.C. § 1961(5), it is clear that two predicate acts *without more* does not.

> (T]he term "pattern" itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern. . . . (T)o prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.

H.J. Inc., 492 U.S. at 239 (emphasis in original; quotation

marks and citations omitted).

B.

Alleged Predicate Acts

Viewing the evidence in the light most favorable to Condrey, the facts necessary to this discussion are that in November of 1985, Tommy Condrey and Richard Howard formed a business, Dixie River Cotton Products, Inc. ("Dixie River Cotton Products" and "DRCP"), for the purposes of buying, selling, storing, and brokering cottonseed. Both Condrey and Howard had worked in the cotton industry for several years and over the years had become associated with various cotton-related businesses. Neither Condrey nor Howard could afford to make any capital investment into the newly formed company, so they decided to use assets and manpower associated with the other businesses with which they were associated. Condrey brought this lawsuit alleging that Howard used Dixie River Cotton Products as well as the other businesses with which Howard was associated — Louisiana Fiber Corp. and Howard Gin — to steal from Condrey in violation of RICO law.[1]

Condrey claims sundry events that took place among the defendants — with Howard always at the center — constitute various predicate acts of mail fraud, wire fraud, and theft of goods in interstate commerce and, when taken together, establish a pattern of racketeering activity for purposes of RICO law. We disagree.

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[1] Richard Howard's attorney, Leo Miller, was also a named defendant. However, he settled with Condrey three days into the second trial.

1. *Port Authority Lease*

Condrey first alleges that Howard's involvement in a warehouse lease amounted to a predicate act of mail fraud. *See* 18 U.S.C. § 1961(1)(B). The elements for RICO mail fraud are (1) a scheme to defraud by means of false or fraudulent representation, (2) intrastate or interstate use of the United States mail to execute the scheme, (3) the use of the mail by the defendant connected with the scheme, and (4) actual injury to the plaintiff. *See Burzynski,* 989 F.2d at 742.

The evidence at trial indicated that in the spring of 1986, Howard and Condrey learned that the local Port Commission was seeking bids on a 20-year lease for a warehouse in Lake Providence, Louisiana. They decided that their corporation Dixie River Cotton Products would make a bid for the warehouse. While Condrey was traveling out of the city, Howard telephoned him to keep him apprised of the progress of the bid. The bid submitted by Howard and Condrey was mailed to and accepted by the Port Commission in July of that same year. However, when the lease was drawn up by the Port Commission, it indicated that defendant Louisiana Fiber Corp. d/b/a Dixie River Cottonseed Products (not Dixie River *Cotton* Products) was the holder of the lease.[2] Their bid on the port lease was published in the *Banner-Democrat,* the official newspaper of East Carroll Parish, and was sent through the mail to all subscribers on August 17, 1986 and September 4, 1986. (Tr. 91, 758). Condrey argues that this establishes several

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[2] Defendant Louisiana Fiber is Richard Howard's closely-held corporation. Dixie River Cottonseed Products was a nonexistant business.

instances of mail fraud based on (1) the letters sent which misrepresented the name of the lessee and (2) the mailing of the local paper reporting the bid to its subscribers.

The district court concluded that Howard's conduct in taking the lease in the name of the wrong corporation was mail fraud because Howard used the U.S. mail in effectuating this fraud. The district court stated that there was

> an act of fraud culminating in placing of the lease of the warehouse from the Lake Providence Port Authority [which] was accomplished through the sending of letters in July, 1986, misrepresenting the name of the lessee and resulting in a lease to Louisiana Fiber, d/b/a Dixie River Cottonseed Products, rather the [Dixie River Cotton Products], on August 1, 1986.

Ruling on Post Trial Motions, p. 14. In brief to this court, Condrey does not indicate where the evidence supporting the district court's finding can be found, but after review of the record, this court does find some evidence that two letters were sent in July of 1986 to accomplish this fraud.[3] (Tr. 679-80; plaintiff's exhibits 4 and 69). Each mailing in furtherance of a scheme to defraud constitutes individual acts of mail fraud. *See United States v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989). Therefore, for purposes of this court's opinion, we will assume without deciding that Con-

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[3] Although the both letters were not sent by Richard Howard himself, it is not necessary to a claim of mail fraud that the defendant himself use the mails. Rather, the defendant need only have caused the mail to be used or reasonably foreseen that such use of the mail may result from his conduct. *See United States v. McClelland*, 868 F.2d 704, 707 (5th Cir. 1989).

drey has established two acts of mail fraud.

Condrey also claims that the placing of the Port Authority lease was mail fraud because the bid on the lease and the acceptance of the lease were reported in the *Banner-Democrat,* a publication mailed to its subscribers. We disagree.

It is essential to Condrey's contention that he establish that the use of the mails was for the purpose of executing the fraudulent scheme. *See id.* (relying on *United States v. Maze,* 414 U.S. 395 (1974)). The thing mailed must be an integral part of the execution of the scheme. *See id.* (quoting *United States v. Kent.,* 608 F.2d 542, 546 (5th Cir. 1979)). The fact that the local newspaper reporting the bid was mailed to its subscribers through the U.S. mail does not establish a relationship sufficiently close to the execution of Howard's scheme. This activity does not constitute mail fraud within 18 U.S.C. § 1341 and accordingly is not a predicate act for purposes of RICO law.

2. *Walden Loaders*

The second predicate act that Condrey alleges is mail fraud related to the purchase of three Walden front end loaders by Dixie River Cotton Products. In August of 1986 Howard and Condrey decided to purchase the loaders for use at Dixie River Cotton Products. In charge of this purchase, Howard — unbeknownst to Condrey — arranged for title to the loaders to be placed in H & W Warehouse instead of Dixie River Cotton Products.[4] The down payment

[4] H & W Warehouse is another of Richard Howard's companies. H & W Warehouse was not a defendant in this case.

for the loaders was drawn on the InterFirst Bank of Harlingen, Texas (Tr. 111-12), and the mortgage papers were mailed from Howard's attorney Leo Miller in Lake Providence, Louisiana to Harlingen, Texas. (Tr. 682-83) Condrey also alleges that later payments on the loaders were also sent through the mail.

The district court assumed for purposes of its opinion that the various mortgage papers and payments for these loaders were sent through the United States mail, although evidence to this effect was not made clear at trial. After a thorough review of the record, there is evidence — although meager — to support Condrey's contention that the mortgage papers for these loaders were sent through the U.S. mails. (Tr. 682-83). And viewing the evidence in the light most favorable to Condrey, we assume — again without deciding — that this establishes one act of mail fraud.

However, we cannot conclude as the district court did that Condrey established mail fraud with regard to the payments made on these loaders. We simply have found no evidence to support this conclusion, and in brief to this court Condrey does not direct us to evidence presented at trial establishing use of the mails in this regard.

3. *Away*

Condrey also asserts that Howard's behavior in connection with Agway — a customer of Dixie River Cotton Products — amounted to a predicate act. The evidence presented at trial suggests that Agway, a Pennsylvania

company, arranged to buy cottonseed from Dixie River Cotton Products. Howard was involved in filling the barges used to transport the cottonseed to Agway's facilities. Condrey claims that Howard overstated the weight of the barges carrying the cottonseed which resulted in Dixie River Cotton Products charging Agway for cottonseed that was never received.

At trial Condrey presented evidence establishing that Agway did in fact wire money to Dixie River Cotton Products in connection with this scheme. (Tr. 145) Based on this evidence, the district court ruled that this conduct by Howard amounted to the predicate act of wire fraud, *see* 18 U.S.C. § 1961(1)(B), because it was foreseeable and expected that Agway would wire funds to Dixie River Cotton Product upon receipt of the grossly exaggerated statements.[5]

4. *Hycoloader Building*

The next alleged predicate act relates to the fraudulent renovation and transfer of title documents of a hycoloader building. Condrey contends that Howard Gin[6] owned a hycoloader building — a large building used to store cottonseed — that Howard and Condrey agreed to purchase on behalf of Dixie River Cotton Products. The building was purchased solely with Dixie River Cotton Products' cottonseed money. Although upon sale of the building Condrey and Howard agreed that the title was to

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[5] This transaction was not mail fraud because Dixie River Cotton Products used Federal Express, not the United States mail, to send out its invoices.

[6] Howard Gin was owned by Howard's father Keener Howard. Richard Howard served as Vice president and manager of Howard Gin.

be placed in the name of Dixie River Cotton Products, in August of 1986 the title documents to the building were in fact placed in the name of Howard and his wife Judith.

The district court did not find these activities to constitute a predicate act. We agree. This alleged fraudulent activity does not amount to mail fraud, wire fraud, or any other offense sufficient to constitute a predicate act. Interestingly enough, in brief to this court Condrey himself concedes that this is not a predicate act, but merely demonstrative of a pattern of fraudulent activity engaged in by Howard. *See* Blue brief at 10 n.8.

5. *Shortweighing Scheme*

Condrey also claims that Howard engaged in a shortweighing scheme that constitutes a predicate act of theft from an interstate shipment. *See* 18 U.S.C. § 1961(1)(B). The evidence presented at trial showed that at some point after becoming involved with Howard in Dixie River Cotton Products, Condrey discovered that a significant amount of seed was missing from the hycoloader building. In response to this missing seed problem, Condrey instituted a new weight ticket procedure. Under the new procedure, every truck delivering seed to Dixie River Cotton Products was weighed before and after delivery of the seed, and the weight ticket was stamped by machine. The difference between the full and tare — or empty — weights indicated the weight of the seed delivered.

Condrey contends that after this policy was instituted, Dixie River Cotton Products had problems with the tickets reflecting deliveries from Howard Gin. Condrey

contends that these tickets reflected deliveries of cottonseed to Dixie River Cotton Products that were never made and resulted in Dixie River Cotton Products paying Howard Gin for cottonseed DRCP never received.

The district court ruled that this alleged shortweighing scheme did not constitute a predicate act because Condrey did not present any evidence of mail fraud as to most of them and there was no theft of an interstate shipment. We agree. After reviewing the record, the evidence presented at trial shows no evidence of theft, as opposed to misstatements of the amounts of seed being conveyed. The misstatements are not theft of goods moving in commerce.[7]

Condrey also contends that the transactions with Farmers Cottonseed, which allegedly involved shortweighing, violated the mail or wire fraud statutes. The sufficiency of evidence that Howard or Farmers transacted any of their business by mail is hotly disputed. The evidence of the use of the mails is vague at best. But for purposes of this appeal, we shall assume that some use was made of the mails.

6. *Economic Development Loan*

Dixie River Cotton Products was a potential beneficiary of an economic development loan granted by

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[7] We find unpersuasive Condrey's argument that the shortweighing was equivalent to loading the trucks with seed and then removing the seed, thereby linking the seed to interstate commerce. There was no evidence to this effect at trial and we are not persuaded by such an inventive argument here.

the East Carroll Parish Police Jury. (Tr. 435). The procedure for becoming a beneficiary of this economic development loan is that any entity desiring the loan — in this case Dixie River Cotton Products — would submit a plan to the police jury indicating how the entity's receipt of this loan would create more jobs in the community. In a letter applying for the loan, Dixie River Cotton Products indicated that it held the lease for the Port Authority building. However, as discussed *supra*, the lease was actually in the name of Louisiana Fiber. Subsequently, the police jury was informed by Howard's attorney Leo Miller that the Port lease was actually in the name of Louisiana Fiber.

An additional requirement to receiving the loan was that Howard had to file non-collusion affidavits from all of the companies with whom the loan recipient anticipated working. Upon learning of this requirement, Howard requested that the police jury withdraw DRCP's application. The loan was awarded to another company, and Howard did not receive any monies from the state of East Carroll Parish in connection with this activity.

Condrey alleges that this establishes a predicate act. The district court found this to be without merit. We agree. We fail to see how this conduct constitutes a viable predicate act for purposes of RICO.

C.

No Pattern of Racketeering Activity

Condrey has established, at most, a few predicate acts — two instances of mail fraud relating to the Port

Authority lease, one act of mail fraud relating to the Walden loaders, wire fraud concerning sales to Agway, and some type of mail fraud with respect to Farmers Cottonseed.[8] However, these predicate acts *without more* are insufficient to establish a pattern of racketeering activity. Condrey's claim is lacking proof of a *pattern*.

As the Court stated in *H.J. Inc.*, "there is something to a RICO pattern *beyond* simply the number of predicate acts involved." *H.J. Inc.*, 492 U.S. at 238 (emphasis in original). The predicate acts must have a "relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.' " *Id.* A pattern is not established by proving, as Condrey had here, sporadic, opportunistic criminal conduct. *See id.* at 239. Establishing a pattern requires showing (1) a relationship between the predicate acts *and* (2) a threat of continuing criminal activity. *See id.*

The relationship among the predicate acts necessitates a showing that the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (relying on 18 U.S.C. § 3575(e)). The predicate acts allegedly proved in this case are of two types: (1) those that divested Dixie River Cotton Products of property that should have belonged to it and (2) those that cheated two

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[8] Even if we were persuaded that all of Condrey's alleged acts constituted predicate acts for RICO, in this case that would not be enough. As discussed *infra*, [i]t is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.' " *H.J. Inc.*, 492 U.S. at 238.

customers of DRCP and its successors. There is no relationship between these two types of dishonest dealing which had different victims, purposes, results, and methods of commission.

Moreover, Condrey fails to satisfy the second requirement of establishing a pattern because there is no threat of continuing criminal activity. The court in *H.J. Inc.* indicated three ways that continuity could be demonstrated: (1) showing that the related predicates involve a distinct threat of long-term racketeering activity; (2) showing that the predicate acts are a part of an ongoing entity's — usually an entity that exists for a criminal purpose — regular way of doing business; or (3) showing that the predicates are a regular way of conducting a defendant's ongoing legitimate business. *See id.* at 242-43.

The predicate acts whose existence we have confirmed or assumed do not threaten long-term racketeering activity, and Condrey makes no claim that they do. Neither does proof of these predicate acts establish the alleged entity's regular way of doing business. The three predicate activities relating to DRCP occurred during the summer of 1986. The Agway and Farmers Cottonseed transactions occurred in two separate years and involved different business arrangements with the customers. The Farmers Cottonseed transaction took place only because DRCP failed to stay in business. These transactions do not reflect continuity so much as a lack of continuity in the methods by which Howard and Condrey did business and their conspicuous lack of success at posing a continuing threat. Predicate acts extending over a few weeks or months and threatening no future criminal conduct cannot satisfy

RICO's continuity requirement. "Congress was concerned in RICO with long-term criminal conduct." *Id.* at 241-42.

CONCLUSION

Civil RICO law provides extraordinary remedies in response to egregious conduct and is concerned with long-term criminal conduct. It is not a weapon to be employed indiscriminately. It is evident that Richard Howard had his hands in a lot of different pots and, to mix metaphors, that a lot of fishy business was going on for which he and Condrey have paid the price. Even so, RICO liability is not suitable against the sporadic, scattered misdeeds of Richard Howard.

For these reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this Chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year: (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activitay in connection with access devices), section 1084 (relating to the transmission of gambling informatin), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), sec-

tion 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 1213 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any

political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect

this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(As amended Pub.L. 98-478, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98-547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub.L. 99-570, Title XIII, § 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 99-646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub.L. 100-690, Title VII, §§ 7013, 7020(c), 7032, 7054, Nov. 18, 1988, 102 Stat.

4395, 4396, 4398, 4402; Pub.L. 101-73, Title IX, § 966, Aug. 9, 1983, 103 Stat. 506, Pub.L. 101-647, Title XXXV, § 3560, Nov. 29, 1990, 104 Stat. 4927.)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do no confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is

engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engages in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pend-

ing final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essentiaql allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

No. 94-0646

FILED
NOV 4 1994

In The

Supreme Court of the United States

October Term, 1994

MARILYN RITTER, Bankruptcy Trustee, Substitute for TOMMY H. CONDREY,

Petitioner,

vs.

RICHARD K. HOWARD, JR., LEO A. MILLER, JR., HOWARD GIN, INC. and LOUISIANA FIBER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HOWARD GIN, INC.

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QUESTIONS PRESENTED

1. Is a "pattern of racketeering activity" established by sporadic, unrelated criminal conduct?

2. Is "continuity" for purposes of a "pattern of racketeering activity" established by predicate acts extending over only a few months?

LIST OF PARTIES

1. Marilyn Ritter, bankruptcy trustee for the Estate of Tommy H. Condrey.

2. Tommy H. Condrey

3. Richard K. Howard, Jr.

4. Howard Gin, Inc.

5. Louisiana Fiber Corp.

6. Leo A. Miller, Jr.

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No. 94-0646

In The

Supreme Court of the United States

October Term, 1994

MARILYN RITTER, Bankruptcy Trustee, Substitute for TOMMY H. CONDREY,

Petitioner,

vs.

RICHARD K. HOWARD, JR., LEO A. MILLER, JR., HOWARD GIN, INC. and LOUISIANA FIBER CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HOWARD GIN, INC.

Respondent, Howard Gin, Inc., respectfully requests that the petition for writ of certiorari be denied for the following reasons.

OPINIONS BELOW

The unpublished opinion of the court of appeals was included in the Appendix to the original petition for writ of certiorari. The

unpublished opinion of the district court, which the petition failed to include, is included in the Appendix of Howard Gin, Inc.

STATUTORY PROVISIONS INVOLVED

This Petition for Writ of Certiorari involves the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. For purposes of this opposition to petition, the most relevant provision is 18 U.S.C. § 1961(5):

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

STATEMENT OF THE CASE

Tommy Condrey filed an action to recover damages resulting from alleged violations of the federal RICO law by respondents, Howard Gin, Louisiana Fiber Corporation, Richard K. Howard, Jr., and attorney Leo Miller. More specifically, Condrey alleged that the respondents violated § 1962(B) and (C) of the Racketeer Influenced and Corrupt Organization Act (RICO).

On July 22, 1991, the original trial jury found no liability on the part of Howard Gin and Richard Howard, but awarded Condrey $300,000 as against Leo Miller and Louisiana Fiber Corporation. Judge Donald Walter ordered a new trial, and the case was retried in June of 1992. During this second trial, defendant Leo Miller settled with the petitioner, and Richard K. Howard, Jr. had to defend himself in proper person as he could no longer afford legal counsel. The second jury found that all remaining respondents,

Richard K. Howard, Jr., Louisiana Fiber Corporation and Howard Gin had violated the RICO statute and awarded the sum of $700,000 to the petitioner.

On December 2, 1992, Honorable Judge James T. Trimble, Jr. granted Howard Gin's motion for judgment as a matter of law and in the event his decision was vacated or reversed, a new trial. Judge Trimble found that there was absolutely no evidence of Howard Gin being involved in any type of RICO "enterprise". There was also a total lack of evidence as to an alleged pattern of racketeering activity committed by Howard Gin. Judge Trimble ruled that to allow the second jury's decision to stand against Howard Gin would result in a "**gross miscarriage of justice**. This court will not permit that to happen". *Ruling at 10a.* (Emphasis added).

The Fifth Circuit Court of Appeals affirmed the judgment of the District Court. The court did not "decline to follow the reasoning of the District Court" as stated by the petitioner. Instead, the court reasoned that given the complex conceptual and factual difficulties, even assuming Condrey could succeed on all issues on appeal, the trial court properly held that the alleged RICO enterprise did not engage in a "pattern of racketeering activity". Thus, the Fifth Circuit did not find that a RICO enterprise had been proven, only that Condrey certainly did not prove a pattern of racketeering activity.

STATEMENT OF FACTS

Dixie River Cotton Products, Inc. (DRCP) was a short-lived business established by Tommy Condrey (Condrey) and Richard Howard (Howard) in November of 1985. The business was originally formed to buy and sell cottonseed, but it failed by late 1986 after being in business for only slightly over one year. During this time, Condrey and Howard were also involved in numerous other businesses and corporations. Howard Gin (HG) is a business

founded in the 1940's and owned almost solely by its president, Keener Howard, the father of Richard Howard. Howard Gin received harvested cotton from local farmers and "ginned" the crop. Richard Howard served as vice president of the company and "gin manager". Keener Howard, as president of Howard Gin, continued to make the major policy decisions and all major buying and selling decisions as to the cottonseed produced through its ginning processes.

In August 1986, Richard Howard bid on a lease for a building located at the Lake Providence Port Facility. Condrey claimed the lease should have been placed in the name of DRCP instead of Louisiana Fiber Corporation (La. Fiber), one of Richard Howard's other businesses. Howard Gin was not involved in the bidding or leasing process and Richard Howard was not representing Howard Gin in performing these activities. In that same month, August of 1986, Howard purchased some equipment (Walden front end loaders) from a company in Texas. Again, Condrey claimed that the title to the equipment should have been placed in the name of DRCP rather than H & W Warehouse, Inc., another corporation owned by Mr. Howard and his wife. The Fifth Circuit assumed "without deciding" that one act of mail fraud was connected with this transaction.

Just a few months later, DRCP was selling cottonseed to a purchaser, Agway, in November of 1986. The seed was loaded onto barges for shipment to Pennsylvania pursuant to an agreement with Agway. Howard Gin was not involved in any of the transactions between DRCP and Agway, nor did Howard Gin participate in the loading of barges. Due to cash flow problems experienced by DRCP, Richard Howard estimated or projected barge weights of the cottonseed. As a result, Agway later sued DRCP, Condrey and Howard, in federal district court. Condrey was found to have been guilty of fraud in connection with this suit.

The remaining allegations concern a dispute between Farmers Cottonseed and La. Fiber over some "missing cottonseed" during the 1987 harvest period. At that time, DRCP was no longer in business. La. Fiber was storing seed for Farmers Cottonseed, a large purchaser of cottonseed in the area, pursuant to a contractual agreement. Later, when the storage facilities were being emptied, La. Fiber could not account for all of the seed and was legally responsible as the warehouseman. Howard Gin was one of numerous gins in the Northeast Louisiana area selling cottonseed to Farmers. Farmers has never claimed that Howard Gin was responsible for the seed loss and declared that Howard Gin delivered every ton of seed the gin claimed to have sold them. Condrey contends that the weight tickets for the cottonseed reflect deliveries of "non-existent" cottonseed to Farmers, even though Condrey's own company, T & C Trucking, delivered almost one-half of the seed to Farmers.

In regards to the sales to Farmers Cottonseed, Richard Howard testified that all weight tickets were hand delivered. Counsel for Condrey tried to impeach Mr. Howard with his deposition testimony wherein Richard Howard did not admit that any tickets were mailed, but stated that it was only possible that some were. Later, at the first trial, Richard Howard testified that no tickets had been mailed because he had checked with people from Farmers and they told him that the tickets had been delivered by hand. There was not a single statement by any witness or shred of documentary evidence showing that checks were mailed by Farmers Cottonseed to Howard Gin. In fact, the actual testimony was the contrary. Richard Howard testified that when the tickets were hand-delivered to Eudora, Arkansas, the drivers would pick up a check and bring it back.

The Fifth Circuit recognized the following:

> The sufficiency of evidence that Howard or Farmers transacted any of their business by

> mail is hotly disputed. The evidence of the use of the mails is vague at best. For purposes of this appeal, we shall assume that some use was made of the mails.

REASONS FOR DENYING THE WRIT

Under the rules of the Supreme Court of the United States, a review on writ of certiorari is not a matter of right, but of judicial discretion. It is to be granted when special and important reasons exist to do so. Petitioner argues that the Fifth Circuit Court of Appeals' decision conflicts with those of other circuits. However, petitioner's argument is incorrect.

The Fifth Circuit Court of Appeals considered the decision to be so unimportant and of no precedential value that the opinion itself was not published. Further, the Fifth Circuit Court of Appeals correctly applied the "pattern of racketeering activity" requirements of "relationship" and "continuity".

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989), the United States Supreme Court held that the term "pattern" requires a showing of relationship between the predicate acts and the threat of continuing activity. *Id.*, 109 S. Ct. at 2900. The Court required that both continuity plus relationship were needed to produce the required pattern.

The relationship aspect focuses on whether the criminal acts "have the same or similar purposes, results, participants, victims or methods of commission or are otherwise inter-related by distinguishing characteristics and are not isolated events". *Id.*, 109 S. Ct. at 2901. The continuity aspect requires a threat of continued racketeering activity. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. *Id.* 109 S. Ct. at 2902.

The Fifth Circuit found that Condrey established, at most, a few predicate acts — two instances of mail fraud relating to the Port lease, one act of mail fraud related to the Walden loaders, wire fraud concerning sales to Agway, and assumed "some type" of mail fraud with respect to Farmers Cottonseed. The Fifth Circuit found that the predicate acts "allegedly" proved in the case were of two types: (1) those that divested DRCP of property that should have belonged to it, and (2) those that cheated customers of DRCP and its successors. In examining the relationship prong, the appellate court found no relationship between the isolated and sporadic predicate acts. The court also held that the predicate acts did not threaten long term racketeering activity.

The alleged predicate acts were not related, consisting only of sporadic, isolated events. The Port lease and Walden loader transactions occurred almost simultaneously in August of 1986. The court recognized that these allegations related to the divesting DRCP of assets that Condrey claims should have belonged to it. Richard Howard allegedly placed the assets in the names of two companies — H & W Warehouse (the Walden loaders) and La. Fiber (the Port lease). Howard Gin was not involved in any way with these transactions, a fact admitted by Condrey himself at trial. The victim of this so-called scheme was DRCP, not Condrey, and neither episode bears any connection to the later events concerning Agway and Farmers Cottonseed.

The next isolated event occurred about three months later when DRCP was selling cottonseed to one of its contractual buyers, Agway. This involved DRCP in "projecting or estimating" the cottonseed shipped in barges rather than submitting the actual weights to Agway. The customer sued DRCP, Condrey and Howard, with the two men being found personally liable. Condrey himself was found to have committed fraud in regards to the Agway situation. Howard Gin was not involved in this activity either, nor was it sued by Agway. The purpose of the Agway actions

was to alleviate a cash flow problem with DRCP. This event was completely unrelated to the Port lease and Walden loader transactions and was not an attempt to divest DRCP of any of its assets.

The final isolated event occurred during the next Fall harvest period in 1987. The cast of characters had dramatically changed. DRCP had failed and was no longer in business. Farmers Cottonseed was a large buyer of cottonseed from the numerous cotton gins in the Northeast Louisiana area. Earlier in 1987, La. Fiber had entered into a contract with Farmers to store the seed Farmers would purchase from the cotton gins. Later, when the storage facilities were being emptied, La. Fiber could not account for 700 to 1,000 tons of cottonseed and as warehouseman, was liable for the missing seed. Howard Gin had sold cottonseed to Farmers that season, but even Farmers admitted that Howard Gin had delivered all the seed the gin said it did. Despite these facts, Condrey claims that Howard Gin did not deliver all the seed it claimed to have, due to average weights used on truck tickets as well as handwritten weight tickets. At trial, Condrey admitted that neither of these methods would have accounted for the 1,000 ton shortage, and he could not show that any of the tickets were false. Further, Condrey's own trucking company, T & C Trucking, delivered over one-half of the total cottonseed of Howard Gin sold to Farmers in that year. Condrey presented no evidence that the weight tickets were wired to Farmers or that Farmers' payment on the seed was mailed or wired to Howard Gin. Judge Trimble said in his ruling that to hold Howard Gin liable in this situation would be a "gross miscarriage of justice". However, even assuming that these predicate acts might have occurred, they are not connected with the other transactions because they involve different participants — Howard Gin, its drivers, etc. (who had not been involved in any of the other activities), a different victim — Farmers Cottonseed, different methods of commission — use of average weights on trucks and handwritten weight tickets. These

actions were not connected with the alleged acts of Richard Howard to place DRCP assets in the name of corporations owned by him. As found by the Fifth Circuit, these activities were simply sporadic, isolated events, not making up a pattern involving the same or similar people, methods of commission, etc.

Also of importance is that the activities lasted for only a short period of time. The Port lease, Walden loader and Agway events occurred within a brief three-month span in 1986. The last event, Farmers Cottonseed, had no connection with the former incidents involving DRCP. However, all of these transactions occurred within about one year.

This case involves a complex and convoluted set of facts. Both the first jury and Judge Trimble found that Howard Gin was not part of an alleged RICO enterprise and that no pattern of racketeering activity was proven by Condrey. The Fifth Circuit decision does not involve the wrong legal standard being applied, but simply the application of the complex facts to the same "pattern" standard enunciated in *H.J., Inc. v. Northwestern Bell Telephone Co., supra.*

Other circuits have followed a similar approach. *See Feinstein v. Resolution Trust Corporation,* 942 F.2d 34 (1st Cir. 1991); *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, *cert. denied,* 111 S. Ct. 2839 (3rd Cir. 1991); *Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc.,* 895 F.2d 971 (4th Cir. 1989), *cert. denied,* 110 S. Ct. 3274 (1990); *Calcasieu Marine National Bank v. Grant,* 943 F.2d 1453 (5th Cir. 1991); *Newport Ltd. v. Sears Roebuck and Co.,* 941 F.2d 302 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 1175 (1992); *Vild v. Visconsi,* 956 F.2d 560, *cert. denied,* 113 S. Ct. 99 (6th Cir. 1992); *American Eagle Credit Corporation v. Gaskins,* 920 F.2d 352 (6th Cir. 1990); *Hartz v. Freidman,* 919 F.2d 469 (7th Cir. 1990); *Information Exchange Systems, Inc. v. First Bank National Association,* 994 F.2d 478 (8th

Cir. 1993); *Brode v. Cohen,* 966 F.2d 1237 (8th Cir. 1992); *Religious Technology Center v. Wollersheim,* 971 F.2d 364 (9th Cir. 1992); *Boone v. Carlsbad Bank Corporation, Inc.,* 972 F.2d 1545 (10th Cir. 1992).

As a result, this case does not involve any novel issue of federal law or conflict among the circuits. The Fifth Circuit Court of Appeals decision should be upheld by the Honorable United States Supreme Court by denying the petition for writ of certiorari.

CONCLUSION

The Fifth Circuit Court of Appeals was not guilty in applying a restrictive standard to the pattern requirement, but simply applied the complex facts in this situation to the *H.J., Inc. v. Northwestern Bell Telephone Co.* standard being utilized throughout the United States. This case does not involve a conflict among circuits, and was considered so unimportant and of no precedential value by the Fifth Circuit that the opinion was not published. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RULING ON POST TRIAL MOTIONS FILED DECEMBER 2, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. 89-0953
JUDGE TRIMBLE

TOMMY H. CONDREY

VS.

RICHARD K. HOWARD, JR., ET AL

RULING ON POST-TRIAL MOTIONS

Plaintiff, Tommy Condrey, filed an action to recover damages as a result of alleged violations of federal law by defendants Howard Gin, Inc., Louisiana Fiber Corporation, Richard K. Howard, Jr., and attorney Leo Miller. Mr. Condrey alleges violations of the Racketeer Influenced and Corrupt Organization Act, commonly referred to as RICO. More Specifically, he claims that each defendant violated Sections 1962(b) and (c) of RICO. This case was first tried in 1991, after which trial the judge granted a new trial on the basis of an inconsistent jury verdict. That jury awarded plaintiff $300,000 against Leo Miller and Louisiana Fiber Corporation, but found no liability on the part of Richard Howard or Howard Gin, Inc. The case was retried in June of 1992, and during the course of that trial defendant Leo Miller settled with the plaintiff and all claims against him were dismissed. At the conclusion of the second trial, the jury found, *inter alia*, that

defendants Richard Howard, Louisiana Fiber Corporation, and Howard Gin, Inc. were engaged in a pattern of racketeering activity, such as, mail fraud, wire fraud, or theft of goods in interstate commerce and that said defendants acquired or maintained an interest in, conducted the affairs of, or controlled an enterprise involving also Dixie River Cotton Products, Inc. and Tommy Condrey through the pattern of racketeering activity. The jury Awarded damages in the sum of $700,000.

Pursuant to the jury verdict, judgment was rendered against Richard K. Howard, Jr. (RH), Louisiana Fiber Corporation (LF) and Howard Gin, Inc. (HG) in the sum of $1,950,000, with interest from date of judgment. The amount of the judgment reflected the required trebling of the damages per the RICO statute and deducting the amount of the Miller settlement therefrom. Additionally, the judgment awarded plaintiff $468,460.40, with interest from judgment, as attorney fees.

All defendants have filed motions for judgment notwithstanding the verdict and/or Rule 59(e) amendment to the judgment and/or new trial. As correctly observed by counsel for plaintiff, Rule 50 of the Federal Rules of Civil Procedure now provides for judgment as a matter of law rather than JNOV, but as counsel for plaintiff observes, the criteria for granting the motion are the same.

Judgment as a Matter of Law

FRCP 50, effective since December 1, 1991, permits the court to grant a motion for judgment as a matter of law, after a full hearing, if there is no legally sufficient evidentiary basis for a reasonable jury to have found for the non-moving party. The comments following the rule states plainly that the amendment

"*effects no change in the existing standard.*" The Fifth Circuit in an *en banc* opinion, *Boeing Co. v. Shippman,* 411 F.2d 365 (1969), held that a JNOV is appropriate if, considering all of the evidence and viewing it most favorably to the party opposing the motion, the evidence and inferences from it point so strongly in favor of the motion that reasonable jurors could not have arrived at a contrary verdict. See also, *Gates v. Shell Oil,* 812 F.2d 1509, 1512 (5th Cir. 1987). The issue before the court on the motion for judgment as a matter of law filed by the defendants, therefore, is whether upon application of the *Boeing* standard reasonable jurors could not have arrived at the verdict reached in favor of Tommy Condrey.

Bases for Motion

Howard Gin predicates its motion for judgment as a matter of law on alleged insufficient proof that HG was part of the enterprise; insufficient proof of predicate acts and a pattern of racketeering activity as required by the statute; insufficient proof of a Section 1962(b) violation; and insufficient evidence of damages. Mr. Howard and Louisiana Fiber claim that no enterprise or pattern of racketeering was established and alternatively seek a remittitur, which in effect is an attack upon the amount of damages awarded. In disposing of the motions for judgment as a matter of law, the court will discuss the issues of HG's involvement, "*the enterprise*" issue, and proof of a "*pattern of racketeering activity.*"

Howard Gin as a Part of the Enterprise

The court's appreciation of the evidence is that Howard Gin, Inc. is or was a corporation almost wholly owned by Keener Howard, Richard Howard's father. This corporation owned and operated a cotton gin. In the course of its operation, it, among other suppliers, sold cottonseed to a corporation formed by plaintiff

Appendix A

Tommy Condrey and Richard Howard known as Dixie River Cotton Products, Inc. There is no evidence of which this court is aware that lends the slightest support to this established concern ever entering into any kind of relationship with Mr. Condrey, Mr. Richard Howard individually, or any of their myriad corporations (Dixie River Cotton Products, Inc. owned jointly and the others owned individually) except that of vendor-vendee or vendor-broker. HG had been in the ginning operation for many years prior to the formation of Dixie River Cotton Products, Inc. (DRCP) in November of 1985. Mr. Keener Howard had permitted Richard to function as manager of the gin since sometime in the 1960's, as the court recalls. In addition to his job, Richard Howard conducted some farming activities of his own and other activities through a number of corporations, including H&W Warehouse and Louisiana Fiber. There is no evidence that HG had any interest in these other ventures of RH. Likewise, Mr. Condrey, before and after participating in the formation of DRCP, owned and operated T&C Trucking, Dixie River Electric Co. and Dixie River Dog Feed. He also owned some interest in Joe's Bayou Gin, where he had at one time worked. Counsel for plaintiff attempts, by argument in brief, to pop a hat with the HG label or the LF label on Richard Howard's head as it suits his purposes. Both Richard Howard and Tommy Condrey had about as many heads as a hydra at a guillotine party. This court defies anyone to determine, from the evidence, which hat adorned which head at any given time material to the issues in this case.

Plaintiff's counsel repeatedly makes the statement in brief that whenever RH acted in a manner that would apparently inure to the benefit of HG, he was acting with binding authority from HG. That is a gross over-simplification of the issue. This court does agree with the argument of counsel for Howard Gin, Inc. that there is a serious misstatement of the law in the court's instruction when,

after stating the correct law that corporations may be liable for acts of the officials if they are related to and committed within the scope of employment, inure to the benefit of the corporation, and are acquiesced in by the corporation, then tells the jury point-blank:

> *"If the individual wrongdoers are high ranking officials of a corporation, then the individual's wrongdoing is the same as the wrongdoing of a corporation and the corporation will be responsible for the acts of the individual."*

The above cited language is not correct law. The undersigned recalls no objection made to the instruction at the time, and defense counsel does not contend that any such objection was made to the undersigned. This case was initially tried before another judge, and counsel apparently agreed that an objection was made to that judge as to the giving of this instruction. There was an agreement among counsel that all objections made at the earlier proceeding, including objections to the instructions, would be deemed made at the new trial. This writer had no access to the earlier objections and was unaware of them, and simply did not take appropriate note of what this court feels to be an incorrect and misleading statement of the law.

There is no testimony in this case, nor is there documentary proof, to show that the corporation, Howard Gin, Inc., ever entered into any kind of association with DRCP, Tommy Condrey, or Richard Howard individually. No resolution of the Board of Directors authorized such. No resolution gave even the president, Keener Howard, much less the gin manager, Richard Howard, any authority to enter into any such association. The functions of the various entities allegedly a part of this association were entirely different. Howard Gin, Inc. was no different from other gins who

sold to DRCP. It was simply that, a seller of cottonseed. When Richard Howard decided that he wanted to go into business with Tommy Condrey, he never suggested that Howard Gin, Inc. be a stockholder in DRCP. He testified that all of his actions as they pertained to the operation of DRCP were in no way connected with or related to his employment as gin manager for HG. Keener Howard testified to the same. Plaintiff's counsel points to the fact that HG received payments from DRCP. It certainly did, as vendor of seed. So did Condrey's corporation, T&C Trucking, as conveyor of seed, but there is no contention that T&C Trucking was part of the alleged enterprise.

Plaintiff's counsel suggests that another reason HG should be considered a part of the enterprise was the fact it rented and later sold a warehouse building to the cottonseed business. This established nothing more than a lessor-lessee and vendor-vendee relationship with respect to the warehouse. It is noted that not long after DRCP's formation, Condrey performed renovation work on HG's building which DRCP was at that time renting. Condrey claimed some $36,000 for this work. When he asked RH about payment from HG for the renovation, RH was quick to tell him that he would have to take that up with Keener Howard, the major owner and president of HG. Keener Howard refused to pay for the renovations, which he had not authorized or contracted for on behalf of HG, but did agree that Condrey could operate his other corporations out of part of the office space which had been created by the renovations. Mr. Condrey had no reason to wonder about who ran HG and who had authority to bind it. He had no reason to believe that HG was part of any ongoing association, enterprise, or entity in which he was involved. Mr. Condrey had been a gin manager himself. Neither he nor anyone else testified that customarily gin managers had authority to bind companies by whom they were employed to any type of association, entity, or enterprise.

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Even if the objectionable language in the instructions recited hereinabove were a correct statement of the law, the evidence does not establish a basis of liability on the part of HG. A gin manager *per se,* all that RH was shown to be in his relationship with HG is not a high ranking corporate official. Even if he were, he could not bind the corporation, simply by virtue of his position, because of any illegal act which he may have committed. Counsel for plaintiff cites *Harrison v. Dean Witter Reynolds, Inc.*, 695 F. Supp. 959, a district court case from the Northern District of Illinois, as authority for the language from the instructions quoted hereinabove. A reading of that case shows that the language was indeed taken practically verbatim from this opinion. The author cited three cases in support of this statement. The first was *D&S Auto Parts, Inc. v. Schwartz,* 838 F.2d 964 (7th Cir. 1988). *D&S* specifically rejected the application of the doctrine of *respondeat superior* in civil RICO cases. The language alluded to by the author of the *Harrison* opinion appears in footnote 5 of *D&S* and clearly shows that it was referring to the case of *Schofield v. First Commodity Corp. of Boston,* 793 F.2d 28 (1st Cir. 1986) and stated that this language was only that used in argument by the plaintiff in the *Schofield* case. The *Schofield* court did not adopt that argument. The *Schofield* opinion itself makes it clear that this language was only a statement of plaintiff's position, not the position of the court, as follows:

> "*Appellant apparently concedes that a wholesale adoption of the respondeat superior concept would conflict with the primary thrust of Section 1962(c). In order to conform to Congress' obvious desire to insulate legitimate businesses from liability she suggests that we could adopt a modified version of vicarious liability, perhaps requiring some level of*

> *scienter before imposing liability. For example, respondeat superior could be limited to acts of high corporate officials, whose actions may be deemed corporate policy, and thus would reflect corporate intent."*

The court went on to observe that such an argument would be one for direct liability rather than vicarious liability, but never did it adopt the language or suggest in any way that actions of corporate officials which are in no way known to or sanctioned by the corporation itself would create either direct or vicarious liability in the corporation. The third case cited by the *Harrison* author, *United States v. DiCaro,* 772 F.2d 1314 (7th Cir. 1985) does not stand for the proposition enunciated. It held that the criminal defendant, DiCaro, could not be held liable under RICO Section 1962(c) where he was both the RICO person and the enterprise as charged in the indictment and as explained in the jury instructions. In summary, this writer is unaware of any reliable legal authority that a corporate officer, solely by virtue of his title, can bind the corporation by committing illegal acts without the knowledge of the corporation and without any authority whatsoever conferred by the corporation.

It appears well settled that vicarious liability through employee conduct cannot provide a basis for civil RICO actions. In *First National Bank of Louisville v. Lustig,* 727 F. Supp. 276 (E.D. La. 1989), Judge Livaudis held specifically that *respondeat superior* could *never* be the basis of liability for a civil RICO suit (at page 280). Further, at page 279, Judge Livaudis stated "*a corporation that is only the passive instrumentality of an employee's wrongdoing cannot be held liable as a principal."*

Plaintiff's counsel, at page 9 of their original memorandum in

opposition to the instant motions, states:

> *"It was after the November 17 bogus ticket and the corresponding Agway wire money transfer that R. Howard wrote the $64,187 in unauthorized checks to Howard Gin, demonstrating that R. Howard was acting on behalf of Howard Gin when he committed wire fraud."* (emphasis supplied)

This is another of counsel's non sequiturs. This conduct on the part of the gin manager in no way presumes or even infers knowledge on behalf of the employer. Mr. Howard and Mr. Condrey both had check writing authority on DRCP, and both wielded that authority with reckless abandon, as the evidence clearly illustrates. The fact that Howard Gin may have benefitted from illegal activities of RH likewise does not ascribe knowledge or liability to HG. As observed by the D&S court, cited *supra*:

> *"***Appellants contend that Saul intended to benefit his employer, as his scheme included payment to Walter although Walter did receive the funds and presumably used them in its operations, it did so unwittingly. Walter was a victim, not a perpetrator. Saul stole the parts from Walter from his own profit in selling them to third parties, leaving Walter with falsified invoices, which, although paid, subjected Walter to suit as soon as D&S discovered the scheme. Sending invoices to D&S cannot be characterized as an action intended to benefit Walter, Saul more likely intended to benefit himself by covering up his theft."*

Even if RH committed the acts of short weighing of which the jury in this case apparently found him guilty without any evidence whatsoever that the officers and/or directors of HG had knowledge of same, the corporation could not be found liable. Perhaps, if such short weighing did occur, RH was attempting to achieve a bonus from HG or, since it was a family owned corporation, improve its finances with the expectation that it would ultimately inure to his benefit when his father relinquished control and perhaps even ownership of that corporation.

It suffices to say that to hold Howard Gin, Inc. liable on the basis of the evidence in this case would result in a gross miscarriage of justice. This court will not permit that to happen.

The "Enterprise" Issue

The jury, in responding to the interrogatories, found that Dixie River Cotton Products, Inc., Tommy Condrey, Richard Howard, Louisiana Fiber Corporation, and Howard Gin, Inc. were an ongoing enterprise that functioned as a continuing unit with a common purpose which had an effect on interstate commerce. 18 U.S.C. § 1961(4) defines an enterprise as including "*any individual, partnership, corporation, or association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.*" The theory upon which plaintiff proceeded in its approach to this issue was that the individuals and corporations mentioned in the interrogatory constituted an "*association in fact*" to form the enterprise.

In this case, two individuals, Tommy Condrey and Richard Howard, agreed in November of 1985, to form a corporation, Dixie River Cotton Products, Inc., for the purpose of buying and selling and/or brokering cottonseed. As indicated above, both of these

individuals owned various corporations or controlling interests in them which operated as separate entities. The record in this case is devoid of any evidence, direct or inferential, from which one could conclude that the two individuals and the corporations mentioned in the interrogatory functioned as a single enterprise. Each maintained its own separate identity and operated in its own sphere of activity. The fact that Richard Howard, as owner of Louisiana Fiber, chose to place a lease contract or title to a warehouse, perhaps fraudulently so, in the name of Louisiana Fiber does not make Louisiana Fiber part of any "*association*" as it has been defined in the jurisprudence. The Fifth Circuit recently addressed this issue, stating that an association in fact enterprise *"(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."* *Calcasieu Marine National Bank v. Grant,* 943 F.2d 1453, at 1461 (5th Cir. 1991). In this case, there was no "*hierarchical or consensual decision making structure*" established by the evidence. The evidence clearly demonstrated that what emerged from the combined talents(?) of the two individuals was a corporation, DRCP, which did business with the corporations owned by both individuals. T&C Trucking, owned by Condrey, hauled seed and was paid by DRCP for that service. Howard Gin, managed but not owned by RH, sold cottonseed to or through DRCP. Louisiana Fiber, which the jury apparently felt had acquired the port lease by fraud on the part of Richard Howard, operated in its own sphere of activity. There is nothing in the record to show that Tommy Condrey had any decision making authority as to Louisiana Fiber or Howard Gin, nor is there evidence that Richard Howard could have made any decisions as to T&C Trucking or Dixie River Dog Feed.

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From the evidence adduced at trial, this court finds no proof of a hierarchical or consensual decision making structure that included anyone other than Dixie River Cotton Products, Inc. and the two owners, Tommy Condrey and Richard Howard. Assuming that Richard Howard committed a pattern of predicate acts, he as an officer and owner of the corporation would not be distinct from the corporation itself so as to form an association in fact enterprise. See *Old Time Enterprises v. International Coffee Corp.*, 862 F.2d 1213 (5th Cir. 1989); *Parker & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580 (5th Cir. 1992); *Data Controls North v. Financial Corporation of America*, 688 F. Supp. 1047 (D. Md. 1988); and *Pell v. Weinstein*, 759 F. Supp. 1107 (M.D. Pa. 1991). Likewise, the corporation (DRCP) could not be both the enterprise and the RICO perpetrator. The association of DRCP, Condrey, and Howard cannot be a RICO enterprise. See, *Parker & Parsley Petroleum, supra,* and *Bishop v. Corbitt Marine Ways*, 802 F.2d 122 (5th Cir. 1986).

The evidence in this case does not support the jury's finding as to the composition of the enterprise, nor will the evidence support any other composition of an enterprise actionable under RICO.

The Issue of "Pattern of Racketeering Activity"

An analysis of this ingredient of the RICO elements must begin with a review of the Supreme Court decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989). Therein, the Court made it clear that a "*pattern*" as envisioned by the statute is not established by merely proving two predicate acts within the ten-year period. The Court observed that "*the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order*", but stated that it is "*not the number of predicate acts but the relationship that they*

bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged'." Additionally, the Court emphasized that *"pattern"* under RICO requires not only relationship between the predicates, but the threat of continuity. Justice Brennan, speaking for the Court, instructed:

> *"RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."*

In order to satisfy the relationship requirement, the Court stated that *"criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."*

As to the second prong of the *"pattern"* test, the Court stated that what a plaintiff or prosecutor must prove *"is continuity of racketeering activity, or its threat, simpliciter."* The Court proceeded by observing that *"continuity"* is both a closed-and open-ended concept. In the former, it referred to a closed period of repeated conduct, and in the latter, to past conduct that *"by its nature projects into the future with a threat of repetition."* The Court stated:

> *"A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time.*

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> *Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct."*

Following *HJ's* precepts, Judge Arceneaux in the Eastern District of Louisiana held that alleged acts of mail and wire fraud extending over a 10-month period from July, 1985 until May, 1986 did not, as a matter of law, supply a continuing threat sufficient to constitute a closed-ended RICO pattern. He likewise found, under the facts of that case as alleged, that no open-ended pattern could be established. See *Newport Ltd. v. Sears Roebuck & Co.*, 739 F.Supp. 1078 (1990). The Fifth Circuit Court of Appeals adopted Judge Arceneaux's holding as to the RICO issues. *Newport Ltd. v. Sears Roebuck & Co.*, 941 F.2d 302, at 304 (5th Cir. 1991).

As predicate acts of racketeering, plaintiff first points to a scheme to steal assets. He first discusses the fact that Mr. Condrey performed renovations to the hycoloader building belonging to HG at a cost of $36,000, for which he was not reimbursed. This has no relevance to this lawsuit whatsoever. 18 U.S.C. § 1961 lists specific state and federal crimes which will be deemed "*racketeering activity*" under the RICO statutes. Nonpayment of a debt such as this, whether legitimate or not, is not listed. He next points to the fact that the lease of a warehouse from the Port Authority of Lake Providence was fraudulently taken in the name of Louisiana Fiber Corporation, d/b/a Dixie River Cottonseed Products, when it should have been leased to DRCP. This was accomplished, according to plaintiff, through the actions of RH and his attorney, Leo Miller. The lease was signed on August 1, 1986. Following correspondence with the State of Louisiana, on August 27, 1987, the lease was taken in the name of simply Louisiana Fiber Corporation.

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There can be no argument that taking the lease in the name of the wrong corporation, however fraught with fraud, fell within the definition of any listed racketeering activity. The argument is that sending the letters to the State of Louisiana and the East Carroll Parish Police Jury with wrong names for the proposed lessee constituted mail fraud. The court will assume that as being established; however, the court further finds that this theft of assets through mail fraud would have been accomplished as of August 1, 1986 when the Port lease was taken in the name of Louisiana Fiber, d/b/a Dixie River Cottonseed Products. When the Port lease was later changed to the name of simply Louisiana Fiber Corporation, that would not have been a new transaction because Louisiana Fiber had already acquired the lease over a year earlier and could not steal the lease from itself. The court finds that from the evidence, the jury could have concluded that an act of fraud culminating in placing of the lease of the warehouse from the Lake Providence Port Authority was accomplished through the sending of letters in July, 1986, misrepresenting the name of the lessee and resulting in a lease to Louisiana Fiber, d/b/a Dixie River Cottonseed Products, rather than DRCP, on August 1, 1986. The court finds this would constitute one predicate act established by the plaintiff.

Also in August of 1986, RH and plaintiff agreed to buy the hycoloader building from HG. There was evidence from which the jury could, and apparently did, conclude that RH and Leo Miller fraudulently had title placed in the name of Richard and Judy Howard in August of 1986, rather than in the name of DRCP, which should have been the rightful purchaser. In 1987, the Howards transferred title to the property to Louisiana Fiber. As to this conduct, there is no allegation that mail or wire fraud ever took place. It is not a predicate act as defined by the statute, and the court finds that it could not have been considered part of a pattern of racketeering activity.

Again, in August of 1986, plaintiff and RH agreed to purchase three Walden loaders from R.W. Armstrong in Harlingen, Texas. RH and attorney Leo Miller, in connection with this purchase caused the transfer documents to reflect the new owner to be H&W Warehouse, one of RH's corporations, rather than DRCP. As with the previous conduct discussed herein, the taking of title to the loaders in the wrong name, though fraudulent, is not proscribed by the RICO statutes. Counsel states that "*Miller participated in interstate telephone conversations concerning these documents.*" Mail and wire fraud must be alleged and proved with particularity. See *Haroco, Inc. v. American National Bank,* 747 F.2d 384 (7th Cir. 1984) (where fraud in the basis for a RICO claim, Rule 9(b) applies), aff'd, 473 U.S. 606, 105 S.Ct. 3291 (1985). Counsel does not indicate in any way when the conversations took place, and more critically, what, if any, fraudulent representations were made during the course of the conversations. The most that can be said for this transaction, as it relates to RICO, is that the sending of the false documents through the U.S. Mail would constitute mail fraud, and for purposes of this opinion, the court is so assuming. At some later date, the court believes in 1987, these loaders were transferred to Farmers Cottonseed as part of a settlement of a dispute concerning cottonseed shortages. As in the case of the Port lease, the court does not consider this to be a separate act but all part of the same conduct of taking title to the loaders in a name other than DRCP, for whom the loaders were intended.

In addition to the "*scheme to steal assets*", plaintiff maintains that RH successfully schemed to steal cottonseed. The jury apparently believed that. The method by which plaintiff claims RH accomplished this in 1985 was by simply overstating the amount of cottonseed in the warehouse and having Condrey issue checks to Howard Gin as seed was sold. In the fall of 1986, when the warehouse ran out of seed and there were unfilled orders, Mr.

Condrey simply deduced that RH had overstated the amount of the seed. In 1986 and 1987, plaintiff claims that RH falsified truck weight tickets so they reflected more seed being brought to the DRCP warehouses than the trucks were actually carrying. Not one truck driver from Howard Gin, which was just one of the seed suppliers among a number of others, testified that they knew anything about any false tickets. In fact, every such driver, one of whom was plaintiff's brother, testified that they were not aware of any false tickets. The "*proof*" of short weighing attributable to RH, because he was the manager of HG, stems from testimony to the effect that the seed factor from HG was overstated to be 1.7 rather than 1.5, and that with a 1.5 seed factor HG could not possibly have delivered from its gin the amount of seed that it claimed to have delivered to DRCP in 1986 and 1987. This tenuous evidence apparently was sufficient for the jury. It is quite involved, and the court, for the purposes of this opinion, will simply assume that the evidence was sufficient to substantiate the jury's apparent finding that such "*short weighing*" did occur. This would not in any way fit the definition of a racketeering activity as defined by the statute. At page 25 of his brief, counsel for plaintiff as much as admits that overstating the amount of seed delivered by trucks moving intrastate from HG to DRCP did not violate 18 U.S.C. § 659 (felonious theft from interstate shipment). That statute proscribes any unlawful taking or obtaining from a railroad car, wagon, motor truck, or other vehicle, or from any tank or storage facility, station house, platform or depot, or from any vessel or wharf, with intent to convert to his own use, any goods or chattel moving in or which are a part of or which constitute an interstate or foreign shipment of freight. As counsel for HG points out in brief, in *United States v. Bizanowicz*, 745 F.2d 120, 122 (1st Cir. 1984), the elements of this offense are defined in the following language:

"*An essential element of the crime of*

> *embezzling or stealing goods under 18 U.S.C. § 659. . . is that such goods (1) be moving as an interstate shipment, (2) be part of an interstate shipment, or (3) constitute an interstate shipment."*

There was no interstate aspect to the shipment of cottonseed from HG to DRCP. Further, the overstating of the truck loads would not amount to the taking of tangible goods or chattel from any shipment. These weight tickets were not mailed, and the court can find no basis whatsoever for any claim of mail fraud or wire fraud connected with them. Nothing connected with the "*short weighing*" in cottonseed deliveries from HG to DRCP constituted a predicate act under RICO.

In November of 1986, RH was in charge of loading a barge with cottonseed destined for a New York customer by the name of Agway, Inc. RH sent, by Federal Express, to Agway a grossly exaggerated statement of the amount of cottonseed that he had loaded on the barge. In response to this misrepresentation, Agway wired $50,000 for cottonseed that it did not receive. The court will conclude that although the false weight tickets to Agway sent by Federal Express did not constitute mail fraud since the U.S. Mail was not utilized, it was not only foreseeable but expected that Agway would wire funds in response to these false representations. Therefore, the predicate offense of wire fraud occurred because RH caused the wire service to be used by means of false or fraudulent pretenses. Counsel for plaintiff argues that RH committed mail fraud when he mailed false weight tickets to the Farmers Cottonseed office in Eudora, Arkansas. His argument in that connection is as follows:

> *"Mail fraud occurred when fraudulent weight*

tickets were mailed to the Farmers Cottonseed office in Eudora, Arkansas throughout 1987 and 1988. Although many tickets were hand-delivered, Richard Howard admitted in deposition that some were mailed. He later retracted this statement at trial but was impeached by his deposition testimony."

The law simply does not support plaintiff's position as above stated. As indicated earlier, mail and wire fraud must be alleged and proven with particularity. There is nothing to show that all weight tickets were false or fraudulent, and certainly the evidence does not establish which, if any, were. Whether any particular fraudulent weigh ticket caused money to be wired by Farmers Cottonseed in response thereto was not established by evidence. As far as the mailing of fraudulent tickets, that was not established either. Even if he admitted at the trial that some tickets were mailed, only if false tickets were mailed would mail fraud be established. As a matter of fact, the evidence is not sufficient to establish the mailing of any tickets by RH to Farmers Cottonseed. Mr. Howard was the only witness who addressed this issue, and he testified that he could not say whether any were mailed or not. Counsel for plaintiff indicates that he established the fact that some were by using his prior deposition to impeach him. Prior inconsistent statements by a witness can be considered for impeachment purposes only, and not to prove the truth of the matters asserted therein. See *New Orleans Saints v. Griesedieck*, 612 F. Supp. 59 (D.C. La. 1985), aff'd, 790 F.2d 1249, and *Dowell, Inc. v. Jowers*, 166 F.2d 214 (5th Cir. 1948), cert. denied, 68 S. Ct. 1346, 334 U.S. 832.

Based upon the foregoing discussion, this court concludes that the plaintiff, as a matter of law, has established only three predicate

acts as defined by RICO. One was the mailing of the letter misrepresenting the name of the lessee in connection with the Port lease. Another was the mailing of the false title documents in connection with the purchase of the Walden loaders. Both of these events took place in August of 1986. The third was the fraudulent misrepresentation of cottonseed loaded on the Agway barge, which caused Agway to wire money to DRCP to which DRCP was not entitled. That occurred in November of 1986.

Based upon the law as expressed in *H.J. Inc.* and *Newport, Ltd., supra*, this court finds that there was not sufficient closed-ended or open-ended continuity to constitute a "*pattern of racketeering activity*" contemplated by RICO. A closed-ended period of only four months, during which only three predicate acts were committed would not provide the necessary element of continuity. The court observes that only two of the predicate acts could be called "*related*", both of those in August of 1986, with the placing of assets in names other than DRCP. The Agway transaction was not related to those two incidents.

As to open-ended continuity, this relationship between Condrey and Howard completely ended in 1988, and the conduct was not of such nature that it would project into the future with threat of repetition.

THE MATTER OF A NEW TRIAL

Rule 50(c)(1) directs the court to rule on the alternative motions for a new trial if judgment as a matter of law is granted. This is to be done by determining whether the motions should be granted if this court's judgment is later vacated or reversed. In compliance with this direction, this court holds that a new trial should be granted in this case to serve the ends of justice.

Appendix A

The reasons supporting a new trial are two-fold. First, the court feels strongly that the jury instruction complained of to the effect that if an individual wrongdoer is a high ranking official of the corporation, then his wrongdoing is the same as the wrongdoing of the corporation, even in the context of the other instructions given, was grossly misleading and erroneous. There is some confusion as to whether a timely objection was made. Counsel for plaintiff cites *Moore's Federal Rules,* Section 51.04, as standing for the proposition that in the absence of a timely objection, a new trial should be ordered only on the grounds of plain or fundamental error. The party moving for the new trial must demonstrate (1) that the instructions, taken as a whole, gave an incorrect statement of the law; and (2) the instructions were probably responsible for an incorrect verdict. Even taking that as the strict standard in this case, given the evidence which was highly inflammatory as against Richard Howard individually, this court feels that the jury in all likelihood relied on just this misstatement of the law in order to find Howard Gin liable. Actually, the same rule would apply as far as Louisiana Fiber Corporation is concerned. Evidence was not detailed as to the make-up of that corporation and specifically whether it was properly run as a corporation with a board of directors making decisions and directing the president, Richard Howard, in his activities. The claims against the defendants are so interwoven that the court feels that a new trial as to all parties would be appropriate.

The other reason for the new trial relates to damages. Both parties have complained that the jury's damages were excessive. In view of the court's ruling that the short weighing was not a predicate act, that complaint is well-taken. Without any doubt, as demonstrated from the amount of time spent in the presentation of evidence and from plaintiff's brief in opposition to post-trial motions, plaintiff's contention is that the largest single factor in the

downfall of DRCP with the resultant alleged losses to himself personally was the alleged short weighing of cottonseed. This court has held that such conduct was not a predicate act under RICO. The law is clear that there must be a proximate causal relationship between the RICO predicate acts and the plaintiff's damages. *Zervas v. Faulkner,* 861 F.2d 823 (5th Cir. 1988) and *Old Time Enterprises v. International Coffee Corp.,* 862 F.2d 1213 (5th Cir. 1989). Without some evidence that would have placed the short weighing in the category of predicate acts, the evidence should never have been admitted, and without it this court feels that the jury could not have found the failure of the business or the $700,000 compensatory damage award attributable to Richard Howard's conduct.

Conclusion

For the reasons set forth hereinabove, this court finds that the motions for judgment as a matter of law in favor of the defendants to be supported by the law and evidence, and said motions will be granted. If this court's judgment is vacated or reversed, this court feels that a new trial as to all defendants should be granted.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this 2nd day of December, 1992.

s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Appendix A

COPY SENT
DATE 12-3-92
BY cag
TO: Trascher
Frank
Ward
Hannah
Hoychick
Howard

APPENDIX B — JUDGMENT ON POST-TRIAL MOTIONS FILED DECEMBER 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 89-0953
JUDGE TRIMBLE

TOMMY H. CONDREY

VERSUS

RICHARD K. HOWARD, JR. ET AL

JUDGMENT ON POST TRIAL MOTIONS

For the reasons set forth in the ruling rendered this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motions for judgment as a matter of law filed on behalf of defendants Richard Howard, Louisiana Fiber Corporation, and Howard Gin, Inc. be and same are hereby granted, and the jury verdict herein is hereby set aside and vacated, and judgment is hereby rendered in favor of Richard Howard, Louisiana Fiber Corporation, and Howard Gin, Inc., dismissing the demands of plaintiff, Tommy M. Condrey, at his cost.

JUDGMENT RENDERED AND SIGNED in Chambers at Lake Charles, Louisiana this 2nd day of December, 1992.

Appendix B

s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

COPY SENT
Judgment Entered 12-3-92
By Celia Anne Gallagher
Copy To: Jumonville
Trascher
Ward
Hannah
Baldwin
Frank
Hoychick
Howard

No. 94-0646

In The

Supreme Court of the United States

October Term, 1994

MARILYN RITTER, Bankruptcy Trustee, Substitute for TOMMY H. CONDREY,

Petitioner,

vs.

RICHARD K. HOWARD, JR., LEO A. MILLER, JR., HOWARD GIN, INC. and LOUISIANA FIBER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS RICHARD K. HOWARD, JR. AND LOUISIANA FIBER CORPORATION

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LIST OF PARTIES

1. Marilyn Ritter, bankruptcy trustee for the Estate of Tommy H. Condrey

2. Tommy Condrey

3. Richard K. Howard, Jr.

4. Howard Gin, Inc.

5. Louisiana Fiber Corporation

6. Leo A. Miller, Jr.

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vs.

RICHARD K. HOWARD, JR., LEO A. MILLER, JR., HOWARD GIN, INC. and LOUISIANA FIBER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS RICHARD K. HOWARD, JR. AND LOUISIANA FIBER CORPORATION

Richard Howard, Jr. and Louisiana Fiber Corporation respectfully oppose the request of Marilyn Ritter for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, mindful of the admonition in Rule 15.3 that this brief shall be as short as possible.

Rule 10 provides that a Petition for a Writ of Certiorari will be granted only where there are special and important reasons therefor. The Rule provides criteria for granting certiorari to include conflict of the decision with that of another Court of Appeals on the same matter, when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, and when the questioned decision has decided an important question of federal law which is unsettled or decided in a way conflicts with decisions of this Honorable Court. The present controversy is not a case of special or important significance; it does not fit within the criteria just mentioned.

The questioned decision does not involve a substantive discussion of the applicable jurisprudence with regard to RICO. The decision, not deemed important enough to publish under the Rules of the Fifth Circuit, rests solely on questions of fact. As such, the decision does not reflect a conflict with the decision of another United States Court of Appeals on the same matter.

In like manner, the questioned opinion does not involve a state court decision. Furthermore, the decision does not conflict with the decisions of this Honorable Court and breaks no new ground on any important questions of unsettled federal law. In her reasons for requesting that the petition be granted, Marilyn Ritter, as Trustee for Tommy Condrey, has invited the Court to "revisit the 'pattern of racketeering activity' requirement for RICO liability, to reduce some of the conflict in the circuits, and to remind the courts that RICO is to be liberally interpreted . . ." (Brief of Petitioner, p. 10). The Court should decline this invitation; it lacks the substance needed for invocation of this Court's jurisdiction.

Even if a conflict in circuits existed on the issue of pattern of racketeering activity (which the respondents deny), the record in this matter is not so formed as to allow pronouncements of the type

rendered by this Court. Moreover, the opinion of the Fifth Circuit could not possibly create a confusing or contradictory jurisprudential impact — it is unpublished.

It is respectfully submitted that in considering this petition for a writ of certiorari this Court should consider what the Fifth Circuit did *not* do. The Court of Appeals for the Fifth Circuit did not hold, as implied by Item #1 of the "Questions Presented", that:

> ". . . the "relationship" for purposes of a "pattern of racketeering activity". . . could not be shown by wrongful acts which affect different victims." Brief of Petitioner, p. i.

The Fifth Circuit clearly held that the two (2) types of alleged dishonest dealings had different victims, different purposes, different results, *and* different methods of commission.

With regard to the second question presented in petitioner's brief, the Fifth Circuit did not hold that:

> ". . . "continuity" for purposes of a "pattern of racketeering activity" . . . could not be shown by predicate acts that involve two separate schemes and four different victims over a period of two and a half years." Brief of Petitioner, p. i.

The Court of Appeals held that Condrey has made no claim that the respondent's acts threaten long-term criminal activity. The court found that there was no proof — an evidentiary matter — that the acts established the entity's regular way of doing business. The court held that the acts regarding what has been dubbed the DRCP scheme occurred in 1986, that the Agway and Farmers Cottonseed claims occurred over two (2) separate years involving different

business arrangements with different customers in different capacities. The court found that the nature of the alleged schemes themselves showed not continuity but discontinuity. *See* page 14 of the opinion.[1]

The Court did hold that it was so obvious that Tommy Condrey did not prove a "pattern of racketeering activity" that it was not even necessary to discuss Condrey's "complex conceptual and factual difficulties" (Opinion A-2).[2]

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1. The opinion of the Court of Appeals is represented as Appendix A to the petition of Marilyn Ritter. The cited page of the opinion is represented as A-14. Future references to the opinion are made to the page of the appendix.

2. Such conceptual and factual difficulties include:

(1) The decision of the trial court appealed by Condrey had found that there was no factual basis to find that Howard Gin, Inc. was a member of the enterprise:

"It suffices to say that to hold Howard Gin, Inc. liable on the basis of the evidence in this case would result in a gross miscarriage of justice. This Court will not permit that to happen." Decision of the Honorable James T. Trimble entered December 3, 1992 at page 9 attached as an appendix to the brief of Howard Gin, Inc.

(2) "The record in this case is devoid of any evidence, direct or inferential, from which one could conclude that the two (2) individuals and the corporations mentioned in the interrogatory functioned as a single enterprise." *Id.* page 10.

(3) "The evidence in this case does not support the jury's finding as to the composition of the enterprise, nor will the evidence support any other compostition of an enterprise actionable under RICO." *Id.* pages 11 and 12.

In the first trial Richard Howard, Jr. was represented by counsel. No judgment was rendered against him, or against Howard Gin, Inc. for that matter. At the second trial Richard Howard, Jr. was unrepresented and the petitioner obtained a judgment against him with the jury apparently attributing his acts to Howard Gin, Inc., a corporation owned by his father. (Ruling on Post Trial Motion by Judge Trimble at page 20, attached as appendix to brief of Howard Gin, Inc.).

It would not serve this Court nor the interests of judicial economy to launch a line-by-line explanation or refutation of the facts alleged by Condrey in his brief or an itemization of those matters which have been omitted from the statement of facts. In six (6) typed pages of factual recitation only one (1) actual citation to the record has been made. Sweeping generalities and misstatement abound such as that contained at page 9 where Condrey states that he established at the trial that Richard Howard submitted fabricated tickets to Farmers Cottonseed. Judge Trimble held that the evidence did not establish which, if any, tickets were fabricated. (Trimble, p. 18). The Fifth Circuit pretermitted the matter. (Opinion A-11). *See also,* the statement at page 22 of his petition wherein Condrey states: "[t]he evidence was that Richard Howard cheated everyone that he and his companies did business with. . . ." The jury apparently accepted such sweeping arguments of Condrey's counsel against the unrepresented Howard but the Court of Appeals and the District Court were not so fooled.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH THIS COURT OR THE DECISIONS OF OTHER CIRCUITS ON THE ISSUE OF THE RELATIONSHIP OF PREDICATE ACTS FOR PURPOSES OF ESTABLISHING A PATTERN.

At his persuasive best, Condrey alleges at page 12 of his petition that Condrey proved that the predicate acts were committed by the same participants, against similar victims, for similar purposes with similar results and using similar methods. Once again, Condrey has used sweeping statements, devoid of factual basis. For example, with regard to his statement that the same participants were involved there is no question but that neither Howard Gin nor Leo Miller participated in each of the alleged predicate acts and Louisiana Fiber Corporation could not have participated in others. The statement regarding similar victims is incorrect on its face because Dixie River Cotton Products, Inc. was owned by Howard and Codrey; Agway was a purchaser of seed; and liability to Farmers Cottonseed arose by virtue of its status as owner of warehoused products stored by Louisiana Fiber as bailee. Condrey's allegations of similar purposes, results and methods are likewise defective upon close review. The relationship among the alleged wrongful acts bears no resemblance to the example provided by this Court in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 So. 2d 229, 198 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Nor does the relationship among the alleged wrongful acts fit within the tests provided by the other circuits as detailed in petitioner's brief.

II.

THE DECISION OF THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH PRECEDENT OF THIS COURT OR DECISIONS OF THE OTHER CIRCUITS REGARDING CONTINUITY.

A review of the Court's opinion indicates that it expressly followed the *H. J. Inc.* case and determined, as a matter of *fact*, that the three (3) predicate activities relating to DRCP and the Agway and Farmers Cottonseed transactions reflected not continuity but lack of continuity and, furthermore, that the conspicuous lack of success demonstrated beyond question that there existed no continuing threat.

CONCLUSION

Despite Condrey's arguments this case does not present a matter cognizable through writ of certiorari. In actuality this litigation represents little more than the inappropriate use of RICO as a weapon in a "commercial divorce" case. The district court appropriately granted the motion of Richard Howard and Louisiana Fiber Corporation for a judgment as a matter of law. The Court of Appeals affirmed without published opinion. This Court should decline to consider the matter further.

Respectfully submitted,

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